Commission of Inquiry into the Deployment of Canadian Forces to Somalia

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Commission d'enquête sur le déploiement des Forces canadiennes en Somalie

Independence in the Prosecution of Offences in the Canadian Forces

Military Policing and Prosecutorial Discretion

a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia

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CHAPTER ONE

Introduction

On December 3, 1992 the Security Council of the United Nations passed Resolution 794 pursuant to Chapter VII of its Charter, authorizing an international coalition to enforce peace in Somalia, using military force if necessary. The primary purposes of the coalition were to restore order where there was none, due to civil war, and to facilitate humanitarian assistance.[1] The coalition was led by the United States with other national forces including the Canadian Joint Forces Somalia (CJFS).

There is strong evidence that, in the main, Canadian soldiers acquitted themselves with distinction in the performance of their duties in Operation Deliverance.[2] However, there were numerous incidents, and at least six were serious suggesting either localized indiscipline or defects in the organization of military order, or both. These incidents and other concerns became the focus of inquiries within the Canadian military.[3] They have also become the subject of external and independent scrutiny by the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.

In the welter of issues before the Commission run two recurring questions: Can there be public confidence in a system of military policing that compromises the independence of the police to serve military imperatives? Can there be confidence in a system of military justice that does not enforce principles of independence and impartiality in the prosecution service that is comparable to the standard expected of the civilian system?

Among the many topics embraced by the Commission's terms of reference are two issues arising from the activities of Canadian Forces in Somalia: the independence of decision making by the military police and the independence of prosecutorial decision making within the military. These issues are the subjects of this paper. Its purpose is to describe the law applicable to the prosecution of offences within the Canadian Forces, to identify issues of concern and to make recommendations for the consideration of the Commission.

CHAPTER TWO

The Role of the Military Police

INTRODUCTION

As with military law generally, the separation of military policing from civilian institutions of policing is justified chiefly by reasons of necessity and trust. The principles underlying the separation of military justice from civilian institutions require that military policing be, in the main, an internal matter: the military should police itself.[1] It follows that if the rationales of necessity or trust cannot be sustained, the existence of a separate military policing function must be reconsidered. However, even if the principles on which this separation from civilian institutions depend are affirmed, a review of military policing could still lead to a consideration of reforms to institutions and procedures in order to reflect other principles or revised principles of necessity and trust.

This part of our paper deals with the issue of independence as a necessary condition of a legitimate military policing function. This subject overlaps to some extent with the subject of Part III — Prosecutorial Discretion in the Military Setting. In particular, the need for independence in decision making, related to the decision to commence and pursue a prosecution, and the role of the military police in that process, is discussed there. Here we deal with some basic ideas about the functions, organization and deployment of military police, with an emphasis on the need for independence in discharging military policing responsibilities. First, however, the principles underlying a separate military policing function must be outlined.

Necessity

The necessity for maintaining a separate military policing function is clearest in field operations. Obviously, the military must ensure orderly conduct and the fulfilment of legal obligations by its members in the field. By definition, in such circumstances there is no reasonable alternative to

self-policing. Those carrying out policing functions in field situations must be specially trained to do so and be capable of performing in combat situations. This necessity is, in large measure, the historical explanation for the separation of military from civilian justice. This principle does not apply only to field operations but extends to military policing in all circumstances where people are subject to the *National Defence Act*.[2] Apart from field operations, military policing plays a major role in the maintenance of discipline within the Canadian Forces (CF). Discipline includes the maintenance of civilian order, that is, compliance with laws of general application in the military setting. The notion of necessity embraces not only the exigencies of field operations but concerns for efficiency and esprit de corps more generally within the CF.

Trust

The separation of military policing from civilian order, however necessary, cannot be justified without confidence that the military will perform its policing functions to a standard of integrity that is acceptable and apparent within and without the military. This trust depends, first and last, on the personal qualities of the members of the Canadian Forces. Training and discipline may reinforce but cannot create the qualities of integrity that earn trust. The reinforcement of trust must nonetheless be fostered by the institutional arrangements and formal procedures for carrying out policing functions within the military.

The question of the degree of independence enjoyed by military police is clearly an issue before the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. So too are questions of the necessity of maintaining a separate military justice system and the degree of trust we may have in that system. It is assumed in this paper that the separation of military policing from the civilian system of justice will be sustained in principle. For this reason, we focus on principles in the organization of military policing rather than on comparisons with other police organizations and their governing legislation in Canadian law.

There are models of military policing in other jurisdictions where the principle of separation from civilian justice is maintained but the organization of military policing has been restructured to enhance independence from the chain of command in police decision making. In the United Kingdom, for example, military policing is conducted in large measure by civilian personnel even though they are not performing the duties of civilian police and are subject to military direction. In the United States, there

is an independent arm of the forces that bears responsibility for a large part of military policing. In addition, the Inspector General in the United States is conspicuously more independent of the ordinary chain of command than is the military police in the Canadian Forces. In short, these are examples in which the principle of separation of military policing from civilian justice is affirmed and characterized by formal guarantees of independence in the organization and duties of military policing itself.

FUNCTIONS

Policing functions in the Canadian military embrace four major themes, which should be noted briefly before turning to the manner in which military policing is formally organized in Canadian law.[3]

Order and Discipline

In view of the number of members in the CF, it is scarcely surprising that one of the central policing functions is the maintenance of law and order within the military, including the enforcement of the criminal law and the Code of Service Discipline in the military context. This is a vast mandate that, for practical purposes, occupies the most time and resources in the administration of military policing. It might be called the routine policing function within the Canadian Forces.

Field Operations

The range of policing in field operations includes duties relating to the orderly deployment of the CF in all aspects of its operations, including traffic control and the movement of personnel, and functions that ensure the compliance of military personnel with their legal obligations. Field operations include combat duties, peacekeeping (or peace making) operations and training exercises.

Civilian Law in the Military Context

Military police have limited responsibilities with regard to civilian law (i.e., the enforcement of laws that do not fall under section 130 of the *National Defence Act* or the enforcement of laws against persons not subject to the Code of Service Discipline) in the military context but this function is nonetheless noteworthy. As will be seen below, military police

have the authority of peace officers and, accordingly, some authority for the enforcement of civilian law that extends beyond the powers recognized under the *National Defence Act*. Military police are also sometimes involved in matters of law enforcement by agreement with civilian authorities. In the main, however, the enforcement of civilian law is not a matter of military policing that is of concern in this paper.

Special Cases

Apart from the three functions identified above, there is a fourth and residual function that can be described as the special case. For the most part, these include matters relating to security.[4]

These categories can be overlapping and, at the margins between military and civilian policing, there are cases in which matters can be addressed in either system. The validity of military policing in those cases drew support — at least until recently[5] — from the military nexus doctrine, which required that there be a connection between the conduct underlying the charge and military interests in order for the military to assert investigative or prosecutorial authority over a matter that could be handled in the civilian system.[6] There are also instances in which there is no easy or clear division between one of these themes or categories of policing and another. This is most obvious in cases where the routine investigation of a service offence also presents questions of security or intelligence.

Despite the various functions of military policing, there is no statutory or regulatory text that consolidates, in a comprehensive statement, the functions of military policing in Canadian law. The scope of policing functions is wide, especially in view of the principle of separation of military policing from the civilian system of justice. For clarity and for ease of reference, a comprehensive and consolidated statement of the functions of military policing would be helpful.

ORGANIZATION

At the core of the formal organization of military policing is a distinction between policing by superiors within the chain of command of ordinary units and formations, and policing by agents outside the chain of command. However, this distinction is not observed in Canadian law in that a military police officer is subject to the authority of the commanding officer in any unit to which he or she is attached. This is the case even if the

officer is normally assigned to a specialized unit of the military police. The chain of command within the unit incorporates the military police and, thus, even though there is a separation of the military police from civilian institutions of justice, there is no clear principle of independence in policing within the military. The command structure, not the military police, make decisions about investigations and charges.[7] The military police are accountable both to commanding officers and to their superiors within the military police organization. This combined reporting requirement operates as follows.

> Military Police personnel are subject to orders and instructions issued by or on behalf of superior commanders and commanding officers. Should such orders or instructions conflict or appear to interfere with their lawful Military Police duties, advice and instructions may be sought through the technical channel of communication from senior Military Police authorities at National Defence Headquarters. The role of these senior Military Police authorities is to ensure that Military Police investigations and activities are conducted in accordance with the law and Canadian Forces policies which reflect generally accepted Canadian police standards and practices.[8]

The lack of independence of military police was commented on in the 1994 Marin Report, in which the author stated:

> [T]here is some question in my mind as to the Military Police officer's individuality, or independence of action and ability to exercise the discretionary powers of a peace officer in view of the "tasking" philosophy prevalent in organizations which place great emphasis on "chain of command". The fact that a Commanding Officer (CO), who may have little knowledge of the law or criminal procedures, is in a position to influence the course of a police investigation certainly bears further scrutiny.[9]

In summary, a distinction between policing within and without the unit chain of command is theoretically important, but it only begs questions concerning the proper scope of self-policing within the chain of command and the need for policing that is external to the chain of command but nonetheless internal to the military.

The Legal Arrangements

The *National Defence Act* is silent with respect to the functions or organization of military policing. The statutory basis of military policing is section 156 of the Act, which simply provides that "specially appointed personnel"

may exercise a power of arrest and detention without warrant for breach of the Code of Service Discipline and "exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council". The Queen's Regulations and Orders (QR&Os), which are regulations promulgated by the Governor in Council, complement the statutory power to appoint specially appointed personnel. For example, article 22.02 of the QR&Os defines specially appointed personnel as "every officer posted to an established position to be employed on military police duties" and "every person posted to an established military police position and qualified in the military police trade".

Section 2 of the Criminal Code designates these specially appointed personnel as "peace officers," which means that they have authority not only with respect to the Code of Service Discipline but the wider authority of a peace officer. The status of a peace officer is recognized in the Criminal Code in persons appointed under section 156 of the *National Defence Act* and in any other person whose duties require the powers of a peace officer and who is appointed a peace officer under the regulations. QR&Os article 22.01 prescribes that officers and non-commissioned officers who perform lawful duties as a result of a specific order or established military custom or practice are peace officers if those duties are related to the maintenance or restoration of law and order, the protection of property, the protection of persons or the apprehension of persons who have escaped from lawful custody or confinement. This sweeping list is not a definition of the functions of military police but it provides some indication of the scope of those functions. QR&Os are otherwise silent on the functions and organization of military policing.

It appears from this structure that the legal foundation of military policing in Canada is the power to appoint special personnel. Neither the Act nor the QR&Os give meaning to "military police duties", "an established military police position" or "the military police trade." Accordingly, the primary legal source for a detailed exposition of the functions and organization of military policing is the power of the Deputy Minister and, more particularly, the Chief of the Defence Staff to make or authorize administrative orders relating to the military police. The volume and importance of policing functions in the Canadian military make a compelling case for a clear statement of the legal basis of these functions in legislation or subordinate legislation.

The Administrative Arrangements

There is no single source in the administrative regulations and orders of the Canadian Forces that establishes the functions and organization of military policing. An important source at the time of the deployment to Somalia was volume 4 of the Security Orders for the Department of National Defence and the Canadian Forces, entitled *Military Police Procedures*.[10] This publication states that the policy and procedure for the conduct of military policing duties and responsibilities are contained in it and in several other administrative orders, most notably Canadian Forces Administrative Order (CFAO) 22-4 and CFAO 22-3.[11] Another source of direction for military police has been police policy bulletins, which state technical direction provided to military police under the authority of the Director General Security in National Defence Headquarters. *Military Police Procedures* specifically enumerates several publications of the Canadian Forces in which policy and procedure concerning the duties and responsibilities of military police personnel are defined.[12]

Military Police Procedures was revised and republished in 1995 with the title *Military Police Policies*.[13] This volume restates much settled doctrine and incorporates the substance of several police policy bulletins. Here again, however, the revised volume does not purport to provide a code for military policing in the CF.

From these sources, the organization of military policing would appear to be as follows. Commanding officers are responsible for maintaining discipline within their units, which means that they have a broad discretion as to the manner in which they initiate investigations into a breach of the criminal law or the Code of Service Discipline. In several instances, the QR&Os oblige commanders to conduct investigations into allegations or incidents of a particular kind.[14] For this purpose, and for any other investigation, they may initiate their own investigations of alleged misconduct or request the assistance of the military police. There is no general rule of conduct that would require a commander to report or remit a suspected breach of the criminal law to the military police. The hierarchical nature of the chain of command means that every commander is accountable to a senior commander, leading in turn to the Deputy Chief of the Defence Staff (who is responsible for operations).

The military police itself comprises a general service and two specialized services, the Special Investigations Unit and the National Investigation Service. Until recently, the senior person responsible for technical direction, co-ordination and supervision of all police matters in

the CF was the Director General Security, who reports to the Deputy Chief of the Defence Staff. (This position has been restyled as Director General Security and Military Police.[15]) The general service has members that report in part to a centralized agency in Ottawa, which provides technical direction and assistance, but its members are deployed and attached to units and formations of the Canadian Forces.[16]

Thus, military police are not separate from other units and, indeed, military police personnel are subject to the chain of command within the units to which they are attached.[17]

The Special Investigations Unit, which once undertook investigations concerning criminal misconduct and security matters, is now concerned only with security matters.[18] The National Investigation Service undertakes criminal investigations that are particularly sensitive or that have national dimensions.[19] These two specialized services are not integrated in the organization of units or formations in the same way as the general police service because they are based at National Defence Headquarters and are available to assist when requested to do so.[20] The specialized services are also not independent of the chain of command within ordinary units and formations when they are attached thereto for purposes of an investigation.

DEPLOYMENT OF MILITARY POLICE

Defined Responsibilities

As noted, the responsibilities of the military police are described in general terms in several administrative orders. They include criminal and service investigations and security inspections conducted for the Department of National Defence. The administrative orders stipulate in several places that the tasks and the priorities of military police will vary according to the needs of commanders, geographical location and the "operational environment".[21]

As also noted previously, military police form part of units and formations.[22] The administrative orders prescribe that there shall be a security advisor at a command or formation headquarters and at a base or station. The function of the security advisor is to provide advice to the commander on matters relating to security and policing. The orders also state the duties of military police at bases and stations. Military police, however, are prohibited from performing any police duties concerning certain matters, including allegations of sexual harassment that would not amount to criminal or service offences. Technical direction is provided to military police in the form of policies, orders and directives of a professional

nature that concern general operating procedure. This also includes direction and the co-ordination of specific investigations and operations.

The administrative orders acknowledge that the duties of the military police will vary with the requirements of commanding officers, geographical location and operational considerations. The requirement for military policing during field operations is, obviously, different than in other circumstances. This is apparent in battle or in field operations, including peacekeeping and peace-making operations, undertaken by the CF under a mandate of the United Nations. The exigencies of field policing include the need for speed in decision making and the burden of distance from the conveniences of the home unit, base or formation. In these circumstances, there is a need for the clearest possible statement of policy concerning the role and duties of the military police in relation to operations of other units and formations of the Canadian Forces. It is also clear that, in such circumstances, there must be close co-operation between operational commanders and the military police.

There is an extensive body of Canadian Forces doctrine that is concerned with the functions of military police in field operations.[23] Included in this literature are directives regarding communications and links between unit commanding officers and military police. There are detailed directives for handling the movement of traffic and personnel. There are directives for the handling of prisoners. At the time of Operation Deliverance, however, there was no general principle requiring a contingent of the Canadian Forces to be accompanied by military police. Nor was there a principle that would require the deployment of military police to investigate particular classes of incidents. Nor was there a principle that military police should be represented in numbers proportionate to the size of the deployed force and the nature of its mission. In fact, only two military police were deployed with the Canadian Airborne Regiment Battle Group (CARBG) in Somalia.[24] Moreover, the military police themselves, while they had the authority to begin an investigation, had no independent authority to order the deployment of specially appointed personnel for this purpose. These limitations on the deployment of military police will undoubtedly frustrate recognized policing functions in some circumstances.[25]

Policing with or without Military Police

Commanding officers have the duty to maintain discipline and order in their commands, including the investigation of criminal or service offences. But for a few specific instances, the administrative orders prescribe

no obligation for a commander to engage the assistance of the military police in this duty, which confirms that in most instances the commander is not obliged to inform the military police of a matter for investigation and not obliged to turn investigations over to the military police. There are exceptions to this general rule, including the requirement to report unusual incidents, matters for the Special Investigations Unit and offences excluded from the responsibilities of the commander. This arrangement means that the involvement of military police lies chiefly in the discretion of the commander. As a matter of practice, there is typically a close working relationship between commanding officers and their security advisors. Protocols both of a formal and informal nature reflect this in the daily routine of the command, formation or unit. In field operations, the matter is more problematic, not least because there is no requirement that military police accompany Canadian Forces in all field operations.

CONDUCT AND CONTROL OF INVESTIGATIONS

Commencement of an Investigation

There is no single procedure for beginning an investigation into a service offence. According to regulations, investigations must be conducted in some circumstances.[26] The military police can begin an investigation on the direction of the commanding officer, the complaint of a member of the Canadian Forces or on the direction of higher authority within the military police itself. The commencement of an investigation by military police must be communicated to the unit commander and to the higher authorities of the military police.[27]

Management and Conclusion of an Investigation

The military police have no formal guarantee of independence in the conduct of their duties. Indeed, it would appear that the formal organization of military policing provides no substitute for independence, as understood in civilian policing, precisely because the theory of the organization is that there is, generally, a sufficient guarantee of integrity in the ordinary chain of command. There are qualified measures that lend some appearance of independence to the operations of the military police.[28] There are directives, for example, that are designed to inhibit interference or improper influence in the conduct of an investigation.[29] There are directives that facilitate investigation by opening channels of communication

for military police. There are restrictions on the use of intrusive investigative powers such as search and seizure. The military police have an obligation to consult with National Defence Headquarters before discontinuing or cancelling an investigation.[30] All of these are significant but they do not amount to a genuine separation of investigators from those whom they might be required to investigate. Nor do they go as far as they might to reduce the likelihood or the effects of improper influence by the command structure.

In the United States, by comparison, a special military policing unit, the Criminal Investigation Division (CID), deals with all serious criminal offences.[31] Other units refer appropriate matters to the CID. Less serious matters are generally dealt with by the command structure as in the Canadian system. Even there, however, measures exist to reduce the likelihood and the effects of inappropriate command influence.[32] As mentioned, in the United Kingdom, civilian police officers play a major role in the military justice system.[33] This helps ensure that the standards and procedures provided for in the civilian setting are applied in the military context.

The Australian system resembles the Canadian one in that most service offences are dealt with by and within the jurisdiction of commanding officers. However, investigations by military police are conducted independently from the chain of command. If a senior officer is under investigation, a senior military police officer will be assigned to the matter. Still, it falls to commanding officers to decide what action to take on a report of the military police (i.e., whether in the form of administrative or disciplinary action).[34] Military police are deployable on peacekeeping and peacemaking operations of the Australian Defence Force. However, only small contingents of military police have been sent on United Nations missions.[35] As described in Chapter Three of this paper, there are other significant differences between the Australian military justice system and the Canadian one (such as the existence of a special prosecution service and a federal judge as Judge Advocate General).

Since Operation Deliverance, the Department of National Defence has conducted a review of its policing policies and one of its conclusions is to affirm the principle that commanding officers should have primary responsibility for the investigation of criminal offences and other serious matters.[36] The preferred position remains that commanding officers should have the discretion to determine whether a particular incident, offence or allegation requires the involvement of the military police. However, problems with independence have been acknowledged and addressed by proposals that include the following:

Establishment of a robust accountability framework that will balance investigative integrity and accountability to the chain of command. A technical control channel has been established to ensure the integrity of certain policing functions, including investigations, oversight and special person appointment.[37]

Problems with a lack of military police independence were also noted in the Thomas Report.[38] In particular, the Report noted that investigations were suspended without appropriate review,[39] information about ongoing investigations was routinely supplied to commanding officers,[40] and the reporting relationships of military police are confusing and give rise to a perception of lack of independence.[41] The Report concluded:

To preserve military police investigative independence, military police should not be under the chain of command it serves. Military investigative resource needs should not compete with operational requirements. Care should be given to the assignment of complex investigations (such as international incidents) in order to provide the right type of attention, resources and expertise ....

It is recommended that:

a. A vision for providing police services be developed in consultation with the community served that ensures independency of investigative process;
b. From the vision, policies, structures and processes be developed which demonstrate independence, fairness, and impartiality;
c. Alternate policing options that are available from both within the Canadian Forces and the public forum, or a combination of both, be explored;
d. Aspects of the investigative process such as jurisdiction, priority setting and resourcing be examined; and
e. Periodic audits of review mechanisms and an oversight commission be considered to ensure systems function as intended and people are held accountable.[42]

Two major issues arise from this absence of independence in military policing. First, as already suggested, the primary issue is whether responsibility for military policing should be shifted, in greater or lesser degree, from the unit commander to military police. This would not be a radical innovation because there are already some limitations on the policing authority of commanding officers under current law. It would be instead an extension of the same principle.

In abstract terms, it can be argued that the involvement of military police in an investigation is probably a prudent gesture in any serious case

or in any case that raises a reasonable possibility of conflict within a unit. Except in some field operations, it will be rare indeed that the imperative for swift decision making demands an immediate disposition and, even in such instances, it will be rare that the matter cannot be contained for subsequent transfer to military police. Suspected breaches of the criminal law, serious service offences and offences involving security could be defined, as a matter of course, as issues requiring the attention of military police. This would imply that commanding officers would be required to report such cases as soon as there are reasonable grounds to believe in the need for investigation.

As a matter of practice, the assistance of military police is routinely sought but it is submitted that careful consideration should be given to a proposal that some designated matters would automatically oblige a commander to notify the military police of the need for an investigation and, further, that such an investigation must be conducted by military police who appear to be and are free of improper influence. This proposal would require that certain designated matters be referred to the military police by a commander and that the commander have no further involvement in the investigation until it had been concluded by the military police.

Second, and whether or not there is a need to modify the respective jurisdictions of commanders and the military police, another major issue that requires attention is whether a commanding officer should control both investigative and prosecutorial decisions in any case over which he or she has jurisdiction. It can be argued that no commanding officer who investigates should be in a position to decide, alone, whether to prosecute or not to prosecute. Indeed, it would seem rudimentary that, except perhaps in exigent field conditions where there would be no alternative, a commander should not be both investigator and prosecutor (or adjudicator) in a case.[43] The appearance of conflict is ineradicable in most instances and this is especially sensitive in cases that might involve the effectiveness of the chain of command in the performance of the unit.

The possibility of undue influence in the conduct of investigations cannot be eliminated even in cases where military police are called to investigate, but the appearance of apparent conflict is obviously clearer in cases where they are not. In the worst case, such influence could amount to overt interference or intimidation but, in any case, there is a possibility of undesirable influences on the conduct of investigations if any member of the CF feels inhibited to disclose or acquire relevant information. This concern embraces not only persons who might assist in the completion of an investigation. It also includes investigators who might feel inhibited or

otherwise uncomfortable in investigations of officers holding superior rank. It cannot be assumed that the chain of command provides a sufficient screen against undue influence, not least because some measure of influence is inherent in the hierarchical structure of command itself. Once again, a useful axiom might be that in the absence of exigent circumstances any investigation of a designated matter should require that the commanding officer either refer the matter to the military police or defer a decision on the disposition of the matter until it can be reached in consultation with the military police or possibly a representative of the office of the Judge Advocate General.

An obvious possible reform to be considered in this context would be to give military police the power to lay charges. At present, it is only commanding officers who have this power. If there is a concern about inappropriate command influence in the activities of military police, it would appear logical to give military police greater authority over charges. This issue is dealt with at length in the next part of this paper which deals with prosecutions.

Another concern is that there currently exists no comprehensive structure for the reporting and review of military policing decisions. The military police has little information on the results of its activities since decisions about charges and their disposition fall to commanding officers, not the police. There is some review provided in the procedure for complaints against the conduct of the military police. There is also scope for review in some of the requirements that relate to reporting, especially the requirement for double reporting by the military police.[44] A revised protocol could significantly enhance the appearance of impartiality in military policing. One possibility would be a system of double decision making and double reporting in which military police and commanding officers consult on the appropriate outcome of an investigation and each respectively reports on the case to superior authorities within the military police and the ordinary chain of command.

In the United States, the function of review and direction of the operation of military police falls primarily to inspectors general. Creation of a comparable office is an obvious possibility for reform in the Canadian context. However, no definitive recommendation is given here in relation to the creation of an office of inspector general in Canada. The possibility of introducing an office (or offices) of military inspector general was canvassed at length in a National Defence Study in 1995.[45] The recommendation of that study was that an office of inspector general should be created in Canada "as an independent and impartial organization outside the chain of command, responsible to the CDS and the DM..."[46] However, that

conclusion was not based merely on the need to provide independent oversight in relation to military policing. The study contemplated a broad array of roles for an inspector general, of which responsibility for military police investigations would be one part. Movement toward creation of the office of inspector general may well be justified as a means of bringing independence to military policing along with other possible benefits. Since we are in no position to measure those other benefits, we express no conclusion on whether creation of an office of inspector general in Canada, except to point out that such a reform has the potential of addressing concerns about the lack of independence of military police.

CONCLUSIONS AND RECOMMENDATIONS

Ultimately, the most important attribute of military policing must be its integrity. By integrity we mean both its autonomy from civilian policing authorities and the accountability of its operations. Whether military policing in Canadian law as it is currently constituted is possessed of sufficient integrity is a question that depends essentially on the assessment of two factors. One, and certainly the more important of the two, is the quality of judgment in the men and women who are responsible for policing in the military. This is an issue that is concerned with the qualifications of applicants for membership and promotion in the Canadian Forces. It is also concerned with the adequacy of training and the rigour of personal self-discipline. There is no catechism of rules and principles that can force a member of the CF not to conceal wrongdoing, and there is no code of procedure that can guarantee rigorous investigation of alleged misconduct. Ultimately, the personal integrity of serving members of the Canadian Forces is a quality that can be promoted by programs and military discipline, but it is a quality that can only be achieved by the assertion of personal responsibility for the exercise of good judgment. Based on its investigations and conclusions of fact, the Somalia Inquiry may conclude that there is no reason to impugn the integrity of the CF or the trust by which it is authorized to police itself.

The second factor that must affect the assessment of integrity in military policing concerns the formal organization of policing in the military for the four functions it must perform. The exposition in this paper suggests that there are several points that could be considered structural defects in the organization of military policing because they frustrate, or appear to frustrate, the integrity of its operations.

Recommendation One

The functions and legal basis of military policing should be set out in the *National Defence Act* or in the Queen's Regulations and Orders.

Commentary. Despite the various functions of military policing, there is currently no statutory or regulatory text that brings together the various functions of military policing in Canadian law. For clarity and for ease of reference, we believe a comprehensive and consolidated statement of the functions of military policing would be helpful.

In addition, the legal foundation of military policing in Canada rests solely on the power to appoint special personnel. Neither the *National Defence Act* nor the QR&Os defines "military police duties", "an established military police position" nor "the military police trade". The primary legal source for a detailed exposition of the functions and organization of military policing is simply the power of the Deputy Minister and, more particularly, the Chief of the Defence Staff to make or authorize administrative orders relating to the military police. Given the variety and importance of policing functions in the Canadian military, we believe there is a strong case for including a clear statement of the legal basis of these functions either in legislation or subordinate legislation.

Recommendation Two

The administrative orders concerning the organization, duties and procedures of military policing should be consolidated into a single source or as few sources as are necessary.

Commentary. The document entitled *Military Police Policies*[47] essentially restates settled doctrine and incorporates the substance of several police policy bulletins. It does not serve as a consolidated code for military policing in the Canadian Forces. Again, because of the variety of functions falling to military police and their importance in the maintenance of discipline and order, the relevant orders should be collected in a single source or as few sources as necessary.

Recommendation Three

Commanding officers should be required to report and refer certain matters or types of incidents to military police for investigation, with appropriate allowance for the exigencies of field operations, and these designated matters should include criminal offences, serious service offences and any matter that has implications with respect to security.

Recommendation Four

Independence in military policing should be strengthened not only by requiring designated matters to be investigated by military police but by limiting the discretion of the commanding officer on completion of the investigation.

Recommendation Five

Contingents of Canadian Forces deployed in field operations should be accompanied by military police in numbers proportionate to the size of the deployed force and the nature of its mission, and clear directives should be given to field commanders that certain types of incident or misconduct must be referred to the military police as soon as practicable for investigation and disposition.

Commentary. The thrust of these recommendations is not to impugn the importance of the chain of command within units or formations for the purpose of military policing. Nor does it presuppose that commanding officers cannot be trusted generally to ensure a high standard of discipline and policing within their commands. These are questions of policy for the determination of the Commission of Inquiry.

Recommendations Three and Four are designed to introduce a formal measure of independence in policing without compromising the authority of commanders or the efficiency of operations. Whether or not commanding officers are capable of conducting effective investigations, there is no obvious reason why they should be responsible for investigations of serious offences or allegations. If a criminal offence or some other designated matter is transparently something that by its nature or possible consequences is penal, there is a compelling reason for engaging the military police in the investigation. The pressure of field operations is generally not present. Most important, however, is that the involvement of the

military police can only minimize the appearance and the possibility of conflicting interests or other factors that might impede the effective investigation of serious matters.[48]

As to which matters might or should be "designated" in the manner suggested above, it is not necessary to make a definitive recommendation within this paper. The designation of matters within the jurisdiction of the military police should be based on substantive criteria relating to the seriousness of the matter and the need for transparency in investigation.

Recommendation Five addresses a problem relating to the deployment of military police. As stated above, at the time of Operation Deliverance, there was no general principle requiring a contingent of the Canadian Forces to be accompanied by military police. Nor was the deployment of military police required in relation to particular kinds of offences. Military police authorities had no independent authority to order the deployment of specially appointed personnel to carry out investigations. We believe this situation should be remedied in order to avoid the frustration of legitimate and recognized policing functions.

CHAPTER THREE

Prosecutorial Discretion in the Military Setting

INTRODUCTION

The issue to be addressed in this part is whether the current arrangements for commencing and pursuing prosecutions under the military justice system are appropriate. As will be seen, one of the primary concerns in this area relates to the role performed by the commanding officer in this process. The question is whether the commanding officer is well-placed to exercise the discretion inherent in the decision to launch a prosecution.

First we discuss the operation of the military justice system, highlighting the important role played by the commanding officer. Second, the significance of independence in the exercise of prosecutorial discretion is discussed, followed by some measures taken in civilian settings in Canada and elsewhere to assure that prosecutorial discretion is properly exercised will be presented. Fourth, the existence of comparable measures in the military context are explored as are issues arising from the prosecutions that followed the deployment of the Canadian Forces (CF) to Somalia. Next points of concern relating to the exercise of prosecutorial discretion in the military are analyzed, and finally, conclusions and recommendations for reform are proposed.

PROSECUTIONS IN THE MILITARY JUSTICE SYSTEM

The essential issue to be addressed here is whether the current system for laying and prosecuting charges under the Code of Service Discipline is appropriate. Given this relatively narrow focus, the continued existence and operation of a separate military justice system is not questioned here. However, since we must analyze closely the roles of some of the key figures in the military justice system, we cannot sidestep a discussion of the purposes, functions and operation of that system. In the course of that discussion, the

appropriate ambit of the military justice system must be considered. To begin, a cursory description of the Canadian military justice system is necessary in order to appreciate the context in which this analysis falls.

The Jurisdiction of the Military Justice System

The Code of Service Discipline is part of the *National Defence Act*.[1] It creates offences and prescribes certain procedures and rules applicable to the prosecution of those offences. The Act is supplemented by the Queen's Regulations and Orders (QR&Os). The Code of Service Discipline defines the ambit of the military justice system in that it prescribes the offences that fall within (and without) it and the persons to whom the system applies.

Persons who are subject to the Code of Service Discipline contained in the *National Defence Act* include members of the Canadian Forces and on-duty members of the Reserve Force.[2] The Code also applies to dependants of members of the CF whom they accompany while the members serve outside Canada.[3]

There are three general categories of service offences: (1) offences of a purely military nature (e.g., negligent performance of duty, absence without leave), (2) offences that are crimes or contraventions under other federal statutes whose provisions are incorporated by reference into the Act[4] and (3) offences under the law of the country in which the conduct takes place.[5] Generally, the military justice system has jurisdiction over these offences (if committed by a person subject to the Code of Service Discipline) no matter where the offences took place. However, there are certain offences to which the military justice system does not apply unless they were committed outside Canada. Section 70 of the *National Defence Act* provides:

> 70. A service tribunal shall not try any person charged with any of the following offences committed in Canada:
>
> (a) murder;
> (b) manslaughter;
> (c) sexual assault;
> (d) sexual assault committed with a weapon or with threats to a third party or causing bodily harm;
> (e) aggravated sexual assault;
> (f) an offence under sections 280 to 283 of the Criminal Code (abduction offences).

This means that these offences, if committed in Canada, may only be tried by civilian criminal courts even though the accused person is otherwise subject to the Code of Service Discipline. Other offences committed in Canada by persons subject to the Code of Service Discipline may also be subject to prosecution in civilian courts, rather than through the military justice system. The justification for prosecuting in civilian courts could, until very recently, be found in the "military nexus" doctrine, although the doctrine has been greatly attenuated, if not abolished, by the Court Martial Appeal Court in *R.* v. *Reddick*[6] (see below).

Offences under the Criminal Code and other federal statutes are also punishable under the Code of Service Discipline and are subject to the same punishment as is provided in the enactment creating them.[7] Accordingly, such offences may be tried by service tribunals. However, the jurisdiction of service tribunals does not supplant that of the civil courts. The civil courts and service tribunals have concurrent jurisdiction over offences punishable under laws of general application.[8] Individuals are protected against double prosecution by the doctrine of autrefois acquit and autrefois convict.[9]

According to the military nexus doctrine, a person subject to the Code of Service Discipline should not be prosecuted under the military justice system unless there is some link between the conduct alleged against the person and military interests or concerns. However, the Court Martial Appeal Court in *R.* v. *Reddick* has severely restricted the application of the doctrine. Chief Justice Strayer, speaking for the Court, stated:

> I believe that the concern about "nexus" in the *Bill of Rights* or Charter context is now misplaced because of the decision of the Supreme Court of Canada in *Généreux*. That decision has confirmed the basic legitimacy of a separate system of military justice. It has recognized that such a system is generally subject to the requirements of the Charter, albeit that those requirements may mandate somewhat different results in the military context. Thus military justice is not treated as a serious exception to the system of fundamental justice generally guaranteed to Canadians by the Charter.... To the extent that the earlier nexus requirement assumed an antithesis between military justice, on the one hand, and the *Canadian Bill of Rights* or the Charter on the other, the more modern judicial and legislative approach has been to bring these elements into closer harmony. That is not to say that a perfect harmony necessarily exists yet, but the emphasis should be placed on making the military justice system meet Charter standards within the special military context, and not on nexus-type issues....
>
> [T]he nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court. Indeed I think it can be put aside as distracting from the real issue which is one of the division of powers. In addressing that issue a court martial

must start by considering whether the Code of Service Discipline gives it jurisdiction in the circumstances alleged in the charges. If so, it can presume that the Code, as part of the *National Defence Act*, is constitutionally valid unless the accused can demonstrate that in his particular circumstances the application of the Code to him would have an unconstitutional consequence.[10]

The fundamental purpose of the military justice system is to reinforce and further the governance of the Canadian military. As stated by Chief Justice Lamer in the case of *R.* v. *Généreux:*

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[11]

The Chief Justice endorsed the comments of Cattanach J. in the earlier case of *MacKay* v. *Rippon*:[12]

Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

Chief Justice Lamer also recognized that, given the broad scope of the military justice system, it also serves a general public function:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline.[13]

These judicial pronouncements underscore the purpose and significance of the military justice system. At the same time, they may set parameters on its proper scope. As Chief Justice Lamer states, the existence of a military justice system derives from the need to deal with matters affecting the discipline, efficiency and morale of the Canadian Forces. The situations referred to by Cattanach J. provide clear examples of circumstances where conduct within the military should be dealt with through disciplinary proceedings in order to promote those interests (i.e., discipline, efficiency and morale).

As a result of *Reddick*, the absence of a military nexus no longer constitutes a basis for challenging the jurisdiction of a military tribunal over the offence. The issue instead is whether the legislation creating the offence is clearly within the constitutional assignment of jurisdiction of its enactor, or at least necessarily incidental to the exercise of that jurisdiction.[14]

Thus, criminal conduct on the part of a person subject to the Code of Service Discipline may be dealt with in the civilian justice system if it occurs in Canada and is among the offences listed in section 70 of the *National Defence Act* over which the military justice system has no jurisdiction. Significantly for present purposes, there is no statutory limitation on the jurisdiction of the military justice system in relation to conduct on the part of persons subject to the Code of Service Discipline which occurs *outside* Canada. There is no list of offences that cannot be so prosecuted and there is no requirement that there be a military nexus. Some limits on the jurisdiction of service tribunals may, however, be contained in status of forces agreements governing the deployment of Canadian troops in particular jurisdictions.[15]

However, it would appear that by virtue of section 273 of the *National Defence Act*, Canadian civilian criminal courts have concurrent jurisdiction

with service tribunals over offences (other than strictly service offences) committed outside Canada by persons subject to the Code of Service Discipline. Section 273 provides:

> 273. Where a person subject to the Code of Service Discipline does any act or omits to do anything while outside Canada which, if done or omitted in Canada by that person, would be an offence punishable by a civil court, that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.

The effect of this provision is to grant concurrent jurisdiction to civilian and military tribunals over *all* offences committed by persons subject to the Code of Service Discipline outside Canada. Thus, for example, a service member charged with a murder allegedly committed in Canada could only be tried by a civilian court. On the other hand, a service member alleged to have committed a murder outside Canada could be tried either under the military justice system or the ordinary Canadian criminal courts.

The exclusion of certain offences committed in Canada from the jurisdiction of the military justice system under section 70 of the *National Defence Act* represents a policy decision that certain offences, no matter what the circumstances, simply do not have a sufficiently substantial connection with the purposes for which the military justice system exists to justify their being dealt with under the military justice system. The reasoning is that a murder, for example, committed in Canada by a service member should never be tried by the military justice system because the general Canadian public interest would supercede whatever military interests may exist in such circumstances. *Quaere*, then, why the situation would be any different if the offence were committed outside Canada and, therefore, why there is concurrent jurisdiction between the military and civilian justice systems under section 273 of the *National Defence Act*.

It should be pointed out that section 273 may have an ambit beyond what was originally contemplated for it. Apparently, the original purpose of section 273 was to provide an alternative to trying civilians by military tribunal outside Canada by conferring jurisdiction on Canadian courts to try civilians who commit criminal offences outside Canada while governed by the Code of Service Discipline (e.g., accompanying spouses of service members serving outside Canada).[16] According to the current Judge Advocate General, the reason for conferring such jurisdiction was

to prevent such civilians who had committed non-extraditable offences abroad from avoiding liability altogether by returning to Canada (where the military justice system would no longer have jurisdiction over them). As the current Judge Advocate General explained:

> This had the potential to cause concern, since once such a person returned to Canada he or she could potentially escape all criminal liability for their actions, unless they had committed an offence for which they could be extradited. The problem is that Canadian criminal law, unlike military law, does not usually extend outside the bounds of Canadian territory. To resolve this potential problem, section 273 of the National Defence Act was enacted. This states that where a person subject to the Code of Service Discipline does something outside of Canada which would have been an offence if done in Canada, then that offence may be tried and punished by a civil court in Canada in whose jurisdiction the offender is found. This section solved the problem of the civilian subject to the Code who fled to Canada to try and escape the consequences of his or her actions. Unfortunately due to less than precise drafting and despite the clear intention expressed in supporting documentation as to the intent of the section, its actual wording does not restrict its application to only civilians subject to the Code of Service Discipline. The section is of course unnecessary for regular and probably even reserve service members, as they remain subject to military jurisdiction in Canada. However, the poor drafting of the section has been at the foundation of recent arguments that military personnel charged with offences relating to incidents which occurred overseas once they return to Canada can be tried by either military or civilian courts.[17]

If section 273 has been drafted badly and, therefore, does not reflect the purpose it was designed to serve (or, more precisely, goes far beyond its original purpose), the question remains: Why should military tribunals have jurisdiction over offences committed outside Canada which, if committed within Canada, could only be tried in civilian courts (i.e., the offences mentioned in section 70 of the *National Defence Act*)? As the Judge Advocate General, in discussing the rationale underlying section 70, stated:

> Murder, manslaughter, sexual assault and certain criminal offences related to inter-spousal kidnapping of children, when those offences are alleged to have been committed in Canada fall solely within the jurisdiction of civilian authorities. Historically that has always been the case, though the offences until recently were murder, manslaughter and rape. The rationale for this exclusive jurisdiction if the offence was alleged to have been committed in Canada appears to have been the *recognition of the predominant civilian interest in what were traditionally considered the most serious offences.* If the offences were alleged to

have occurred outside of Canada the military had exclusive "Canadian" jurisdiction, presuming local authorities were unable, or, if able, could be convinced they did not want to exercise jurisdiction.[18]

This argument raises a further question: If there is a "predominant civilian interest" in the charges mentioned in section 70 when those offences are committed in Canada, is the situation any different when those offences are committed abroad? Further, there are presumably other situations where there is a predominant civilian interest in charges against persons subject to the Code of Service Discipline. In relation to charges arising from incidents on Canadian soil, the military nexus principle is used to determine situations where that civilian interest surpasses the military connection with the offence. It may be fairly asked whether the same should not be true for events abroad.

Certainly, there are factors that may set misconduct on foreign soil apart from similar behaviour in Canada. For example, it may be necessary for the trial to take place in the location where the conduct occurred because that is where the evidence and witnesses are located. Further, there may be a status of forces agreement in place that would permit a service tribunal to try an offence but not allow for the removal of the accused person from the location of the crime. Accordingly, trial by service tribunal may be the only alternative to yielding to the jurisdiction of the foreign state. It would be possible, however, to give presumptive jurisdiction to civilian courts over section 70 offences in the absence of compelling reasons for trial by service tribunal. If the trial could be held in Canada, for example, there would be no need to give sole jurisdiction to a service tribunal.

As mentioned, it is not our role here to question the proper scope of the military justice system. However, we must consider the appropriate roles of those persons who discharge the prosecution authority in relation to offences committed by persons subject to the Code of Service Discipline. If there are situations where the prosecution of such offences does not engage the legitimate military interests in discipline, efficiency and morale, or where civilian interests surpass the military concerns, then it may fairly be asked whether there should exist a means of identifying those situations and prosecuting the corresponding charges either in the civilian courts or in a fashion that may better protect those civilian interests.

In the following detailed discussion of the process of laying charges and proceeding on service offences, one must be mindful of the fact that there are certain offences and persons not governed by the military justice system.

The Exercise of Prosecutorial Responsibilities within the Military

General Roles and Responsibilities. A key role in the military justice system falls to commanding officers. "Commanding officer" is a relative term. Every person subject to the Code of Service Discipline has a commanding officer with authority to act in matters of military discipline in relation to that person. The commanding officer has the primary authority to investigate alleged offences, issue search warrants, arrest suspects, lay charges and commence proceedings.

The term "commanding officer" is defined in Volume I of the QR&Os as follows:

"commanding officer" means,
(a) except when the Chief of the Defence Staff otherwise directs, an officer in command of a base, unit or element, or
(b) any other officer designated as a commanding officer by or under the authority of the Chief of the Defence Staff;[19]

This definition is expanded in volume II of the QR&Os, which deals with military justice matters. Article 101.01 provides:

(1) For the purposes of proceedings under the Code of Service Discipline, "commanding officer":
(*a*) means, in addition to the officers mentioned in the definition of commanding officer in article 1.02 (*Definitions*), subject to paragraph (2), a detachment commander; and
(*b*) includes, in relation to an accused person,
(i) the commanding officer of the base, unit or element to which the accused belongs or, except in the case of a detention barrack, the commanding officer of the base, unit or element in which the accused is present when any proceedings in respect of him are taken under the Code of Service Discipline, and
(ii) if the accused is a commanding officer, the next superior officer to whom the commanding officer is responsible in matters of discipline or such other officer as the Chief of the Defence Staff may designate.

Generally, then, a commanding officer is the commander of a base, unit, element or detachment. The commanding officer for those who are otherwise commanding officers themselves is the next most senior officer. In addition, commanding officers may be designated by the Chief of the Defence Staff.

Commanding officers can delegate some of their powers. For example, a commanding officer can authorize a more junior officer[20] to exercise powers to try offences summarily and impose punishment on non-commissioned members of the CF below the rank of warrant officer, but only in relation to offences for which the accused does not have the right to elect trial by court-martial.[21]

Proceedings in relation to military discipline matters generally begin with a complaint. The complaint is an allegation that a violation of the Code of Service Discipline has occurred. Once a complaint has been made, or there are other grounds to believe that an offence has been committed, an investigation must ensue.[22] The goal of an investigation at this stage is to determine whether there are sufficient grounds to lay a charge.[23]

In addition, the *National Defence Act* requires that an investigation take place *after* the laying of a charge.[24] In this context, a "charge" is a formal accusation that a person has committed a violation of the Code of Service Discipline.[25] The QR&Os set out prescribed charge reports and charge sheets for this purpose. Charges are referred to the accused's commanding officer for action.[26]

The commanding officer may order an investigation into the charge, even if an investigation was already conducted prior to the laying of the charge. The results of the investigation will be reported back to the commanding officer.[27] To assist in the investigation, the commanding officer can issue a search warrant.[28] In this context, the commanding officer assumes a function equivalent to a justice in the civilian justice system. The search warrant may be issued by the commanding officer based on information received under oath from an applicant and on grounds analogous to those provided for search warrants under the Criminal Code.[29]

When the results of an investigation are reported back to the commanding officer, the officer may require further investigation if he or she is of the view that the investigation was inadequate.[30] Alternatively, if the commanding officer is satisfied with the investigation, he or she will consider what action to take on the charge.[31]

At this point, the commanding officer's role in the disposition of charges begins. The commanding officer who receives a charge may dismiss it without further action if he or she "considers that [the] charge should not be proceeded with"[32] If, on the other hand, the commanding officer believes that the charge should be pursued, he or she must "cause it to be proceeded with as expeditiously as circumstances permit".[33]

As mentioned, delegated officers can only try offences committed by non-commissioned members below the rank of warrant officers and which are not included in the list of offences for which the accused has the right

to choose to be tried by court-martial.[34] As will be discussed in more detail below, an accused has the right to be tried by court-martial in any case involving an offence listed in article 108.31(2) of the QR&Os.[35] Since delegated officers have limited powers of punishment,[36] if they are of the view that the punishment that would likely be imposed on conviction for the offence before them exceeds their powers, they must refer the case to the commanding officer or another delegated officer.[37]

Where charges are referred by a delegated officer to the commanding officer, the commanding officer has various options.[38] First, he or she may decide to dismiss the charge. Second, the commanding officer may refer the charge back to the delegated officer (or another) for trial. Third, where appropriate, the commanding officer may try the case. Fourth, he or she may refer the case to a higher authority for disposition.

The commanding officer's powers to try offences are set out in the *National Defence Act*.[39] Commanding officers have jurisdiction to try offences under the following conditions:

- The accused is an officer cadet[40] or non-commissioned member below the rank of warrant officer.
- The commanding officer considers his or her powers of punishment to be adequate in the circumstances.
- The accused has not elected to be tried by court-martial.
- The offence is not one the commanding officer is precluded from trying.
- The commanding officer does not have reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the offence.

The commanding officer's powers of punishment are set out in the *National Defence Act*[41] and amplified in the QR&Os.[42] A commanding officer may impose sanctions ranging anywhere from a caution to detention for up to 90 days.

The *National Defence Act* sets out limits on the power of a commanding officer to preside over a summary trial after an investigation.

163(1.1) Unless it is not practical, having regard to all the circumstances, for any other commanding officer to conduct the summary trial, a commanding officer may not preside at the summary trial of any person charged with an offence where

(*a*) the commanding officer carried out or directly supervised the investigation of that offence; or

(*b*) the summary trial relates to an offence in respect of which a warrant was issued pursuant to section 273.3 by the commanding officer.

In addition, the commanding officer may not try the case where to do so would not be in "the interests of justice and discipline."[43]

Where the commanding officer is of the view that the foregoing conditions are met, he or she must order the accused to appear, along with an assisting officer, for a summary trial.[44] If the necessary conditions are not fulfilled, or if the commanding officer believes that it would be inappropriate to proceed to trial, the commanding officer must refer the case to a superior officer or another commanding officer.[45] If the case is referred to a superior officer, the commanding officer may make a recommendation that the case be dealt with by way of a court-martial, in view of the seriousness of the circumstances.[46]

The QR&Os set out rules of procedure governing summary trials.[47] Generally, these rules are aimed at ensuring that the trial is conducted fairly. For example, the rules require the commanding officer:

- to grant an adjournment if the accused requires more time to prepare the case;
- to permit the accused to elect trial by court-martial, if appropriate;
- to admit evidence that is helpful in deciding whether to dismiss the charge, reach a verdict or remit the case to a higher authority;
- to hear the accused and the accused's witnesses;
- to permit the accused's assisting officer to act on behalf of the accused;
- to allow the accused to put questions to witnesses; and
- to permit the public to attend the trial.[48]

It may happen, during the course of a summary trial, that the commanding officer concludes that his or her powers to impose punishment on the accused are insufficient in light of the facts that have been revealed in the course of the trial. In that case, the commanding officer must refer the matter to a higher authority.[49]

The commanding officer may convict an accused person at a summary trial if he or she concludes that the offence has been proved beyond a reasonable doubt.[50] At that point, the commanding officer receives submissions and evidence from the accused with respect to the sentence. The factors relevant to the sentence are:

- the gravity of the offence;
- the accused's character and previous conduct; and
- the consequences of the conviction and sentence.[51]

In some cases, the sentence imposed by the commanding officer must be approved by a higher authority, called an "approving authority." This approval is required when the commanding officer wishes to impose on a sergeant, master corporal or corporal a punishment of detention or reduction in rank.[52] It is also required when the commanding officer wishes to impose on a private a sentence of detention in excess of 30 days.[53] An "approving authority" is defined as an officer not below the rank of brigadier-general or another officer, not below the rank of colonel, who is designated by the Minister.[54] The approving authority has the responsibility of determining whether the punishment proposed by the commanding officer is appropriate in the circumstances.[55]

Trials by Superior Commander. The *National Defence Act*[56] also provides for disciplinary powers of superior commanders.[57] Superior commanders have the power to try summarily an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant. In essence, the summary trial procedure before superior commanders mirrors that of summary trials before commanding officers.[58]

Courts-Martial. The accused has the right to elect a trial by court-martial, rather than a summary trial before a commanding officer or a superior commander, if charged with certain offences. Articles 108.31(2) and 110.055 set out the list of offences for which the accused has this right of election. If the accused is charged with one of these offences, the commanding officer or the superior commander must inform the accused of the right to choose trial by court-martial.[59] An accused also has the right to elect trial by court-martial if the offence is one for which the accused would be liable to a punishment in the form of a fine exceeding $200 or any period of detention.[60] In the latter case, it is the commanding officer who must reach a conclusion about the likely punishment that would be imposed on the accused and, if appropriate, inform the accused of the opportunity to be tried by court-martial.

There are four types of court martial: the general court-martial, the disciplinary court-martial, the special general court-martial and the standing court-martial. The following description of the four types of court martial is taken from a brief on military justice prepared by the Somalia Inquiry Liaison Team for the Commission of Inquiry.

A General Court Martial consists of five officers, the senior of whom acts as the President of the court martial. A Judge Advocate, who is a military trial judge, is appointed to act essentially as a judge in a jury trial. The military trial judge decides issues of law and mixed law and fact, and also provides direction and instruction to the members of the court-martial. A General Court Martial may try any person, including a civilian, who is liable to be charged, dealt with and tried on a charge of having committed any service offence. A General Court Martial can award the full range of punishments set out in the *National Defence Act* [s.] 139(1).

A Disciplinary Court Martial consists of three officers, the senior of whom acts as the President of the court martial. A Judge Advocate, who again is a military trial judge, is appointed to act essentially as a judge in a jury trial performing the same functions as at a General Court Martial. A Disciplinary Court Martial may not try a civilian or any officer of or above the rank of major. This type of court martial can award a range of punishments including a fine or imprisonment for less than two years.

A Standing Court Martial consists of a military trial judge, appointed by the Minister to be the President. That officer presides alone over the trial. A Standing Court Martial cannot pass a sentence higher than imprisonment for less than two years. A Standing Court Martial cannot try a civilian and cannot try an officer of or above the rank of colonel. A Standing Court Martial has powers of punishment similar to those of a Disciplinary Court Martial.

A Special General Court Martial consists of a Presiding Judge appointed by the Minister of National Defence. A Special General Court Martial may try only a civilian. A Special General Court Martial can award a sentence of death (but only if prescribed in the offence section), a fine or imprisonment.[61]

A general court-martial or a disciplinary court-martial takes place when a "convening authority" so orders. The convening authority stipulates what type of court-martial should be held.[62] The convening authority may be the Minister of National Defence,[63] the Chief of the Defence Staff or the commander of a command who receives an application from a commanding officer.[64] The convening authority notifies the chief military trial judge of the need to appoint a president of the court-martial and the other members of the court.[65] The chief military trial judge then appoints the president and the other members and forwards the appointment order to the convening authority and the Judge Advocate General.[66] An SGCM or a SGM conducts a trial when directed by an officer commanding a command, or another officer designated by the minister.

A full discussion of procedures at courts-martial is inappropriate here. Still, some aspects of court-martial proceedings should be mentioned in order to make clear the role of the various participants. Since it is the general

court martial that concerns us most here, emphasis is given to the particular features of that process.

The president of a general court martial must be of or above the rank of colonel and must be at least the same rank as the accused.[67] Any officer of the Canadian Forces of or above the rank of captain is eligible to be appointed as a member of a general court-martial,[68] but there are certain restrictions that may apply in a given case. For example, the convening authority cannot be a member of the court-martial — nor can the prosecutor, a witness for the prosecution or the accused's commanding officer. Further, any person involved in the investigation against the accused is ineligible.[69]

The president of the court-martial has a general duty to ensure that the proceedings are conducted in an orderly and proper fashion and that the court discharges its responsibilities properly.[70] Included in those responsibilities is an obligation to ensure that an unrepresented accused receives a fair trial.[71] The court must generally defer to the judge advocate on matters of law and procedure unless there are "very weighty reasons" for not doing so.[72]

The chief military trial judge appoints the judge advocate at a general court-martial.[73] The judge advocate's responsibilities are really judicial in nature. They include presiding over the formalities of commencing the court-martial,[74] making rulings on questions of law or of mixed fact and law,[75] addressing the court on the law applicable to the charges against the accused,[76] charging the members of the court before its deliberations[77] and instructing the members of the court on sentencing issues.[78]

The QR&Os set out some other basic responsibilities of the judge advocate. The judge advocate must always maintain an impartial position as between the prosecution and defence.[79] He or she must advise the court of any defect in the charge, the constitution of the court or the proceedings themselves.[80] In addition, the judge advocate must, along with the president of the court-martial, make sure that the accused is not disadvantaged in any way because of a lack of familiarity with the formalities of the proceedings.[81]

The prosecutor is appointed by the convening authority or an officer designated by the convening authority to do so.[82] The convening authority may, with the consent of the Judge Advocate General appoint a civilian laywer to act as prosecutor.[83] The prosecutor is under a general duty to assist the court in the performance of its duties and, more specifically, must not suppress any facts favourable to the defence.[84] Further, the prosecutor must not refer to any irrelevant facts, use excessive language, act unfairly toward the accused or comment on the fact that the accused has not given evidence.[85]

The accused is entitled to have an "adviser"and to be represented by a military defending officer at no expense to the accused [86] or by civilian

legal counsel (at the accused's expense).[87] The accused can choose a particular defending officer or have one appointed.[88] If the accused chooses a particular defending officer, the commanding officer has an obligation to try to make that officer available.[89] A defending officer may be any commissioned officer[90] but, in practice, is usually a legal officer from the Office of the Judge Advocate General. It falls to the commanding officer to ensure that the accused has full opportunity to prepare a defence to the charge and communicate with the defending officer or legal counsel.[91]

Judge Advocate General. There are two main aspects to the Judge Advocate General's role in relation to prosecutions. The first is advisory: legal officers from the Office of the Judge Advocate General may be called on by commanding officers to give legal advice in relation to a disciplinary matter. The second is functional: prosecutors from the Office of the Judge Advocate General actually execute the prosecution function before courts-martial, essentially acting the same as Crown counsel in civilian matters.

In exercising authority in relation to disciplinary proceedings, the commanding officer will frequently consult with military police and prosecutors. The commanding officer may also seek legal advice from JAG officers in executing his or her duties in disciplinary matters.

The actual process of a court-martial trial is substantially the same as an ordinary criminal trial. The judge advocate plays a role roughly equal to that of a judge in civilian proceedings, and the president and other members of the court act as a jury. Unlike in the civilian setting, however, the verdict at a general court-martial is determined by a majority of the members rather than unanimously,[92] and the members of the court-martial decide on the sentence following a guilty verdict.[93]

Summary of Prosecutorial Decisions. By far the most important role in the military justice system described above falls to the commanding officer who:

- orders an investigation by military police;
- issues search warrants;
- decides whether to proceed on a charge;
- may delegate some decisions to more junior officers;
- tries some charges summarily;
- may refer a charge to a higher authority;
- imposes sanctions up to 90 days' detention;
- informs the accused of the availability of a court-martial, where appropriate; and

- must attempt to make the defending officer of the accused's choice available.

Clearly, the role of the commanding officer is multifarious and complex. It has no analogue in the civilian system of criminal justice. For example, it includes some of the functions of civilian police, such as commencing an investigation and laying charges. In addition, it includes some judicial functions, such as issuing process, trying charges and imposing sentences.

At the same time, the commanding officer could not be described as a "prosecutor" as that term is used in the civilian setting. It is not the commanding officer who has carriage of the state's case before a court-martial — this role falls to legal officers in the Office of the Judge Advocate General. The commanding officer does not order the holding of a court-martial or specify the form the court-martial will take. This function is analogous to the powers of a public prosecutor to prefer an indictment and elect between summary conviction and indictable procedure. While initially exercised by the commanding officer in deciding whether to try summarily a military offence or apply for a court-martial, this function is ultimately exercised by the convening authority. Of course, like the commanding officer, the convening authority is part of the command structure, not the military legal apparatus.

Accordingly, the critical decisions in the process of investigating and pursuing prosecutions for unlawful conduct in the military are taken within the command structure, mainly by the relevant commanding officer. Among those decisions, the decision to prosecute is the most significant. It is this decision that sets the military justice system in motion and, potentially, can result in deprivations of liberty on the part of accused persons, as well as other lesser punishments. It is also the point at which the purposes of the military justice system, described above, are in issue. In effect, the decision to prosecute devolves into a preliminary determination that unlawful conduct has occurred and that the good order and discipline of the military requires that it be sanctioned. To appreciate fully the significance of the decision to prosecute requires a discussion of the exercise of that discretion in the civilian setting. This is the subject of the next two sections.

THE IMPORTANCE OF INDEPENDENCE IN THE EXERCISE OF PROSECUTION FUNCTIONS IN THE CIVILIAN SETTING

In the civilian setting, a great deal of attention has been given to the idea that prosecutorial decision making, especially the decision whether to prosecute, should be executed independently. Independence is a relative and contextual concept. We mean something different when we talk about the need for independence in the judiciary, for example, as compared to the requirement of independence for police.

Independence in the exercise of the discretion to prosecute is important because of its close connection with the Rule of Law. The authority to prosecute a person for alleged misconduct is the most serious power the state can wield against its citizens. It can result in serious deprivations of individual liberty even when the charges, in the end, are not proved. Thus, the decision to launch a prosecution must be taken with the greatest of care. Further, it must be made even-handedly in the sense that all persons should be equal before the law. Wrongdoing should be punished no matter whether its author is a person of prominence or a person of few means. The decision to prosecute must be made fairly and on the basis of clear evidence. Independence of judgment on the part of the person exercising prosecutorial authority is crucial to a system of justice based on equality, fairness and respect for the Rule of Law.

In the prosecution setting, when one speaks about the need for independence in decision making, one is generally referring to the need to ensure that the discretion exercised by those in positions of authority is based solely on relevant considerations. Of course, what is "relevant" depends on the particular setting in which the decision is being taken. In the civilian context, what is most relevant in the decision to lay a charge (or not) is whether there is sufficient evidence to justify proceeding on the charge. This decision, in Canada, is generally taken by the police,[94] and the applicable standard is expressed as reasonable grounds to believe that the person has committed an offence. There is a further decision to be taken in the civilian setting as to whether, once laid, the charge should be proceeded on. This latter decision is generally taken by prosecution authorities (within the relevant attorney general's office) and the applicable standard, generally, is whether there is a reasonable likelihood of obtaining a conviction on the charge and, further, whether the public interest would be served by a prosecution. A fuller discussion of the factors involved in launching a prosecution in the civilian setting is set out below.

The standards, according to which charges are laid and proceeded on in the civilian setting, are important. They have been fashioned in order to

erect an objective evidentiary threshold which must be met before a person is subjected to trial on a criminal charge. There is the further consideration at the prosecution stage of the overall public interest which is, obviously, less susceptible to objective quantification. The public interest branch of the test is intended to direct the decision maker (i.e., the prosecutor) to take into account the circumstances of the offence and of the offender in deciding whether the charges should proceed. In other words, the public interest factor is related directly to the particular charge and offender. It does not permit a prosecutor, for example, to act on the basis of political considerations.

Strictly speaking, the existence of objective, rather than subjective, standards is not inherent in the concept of independence in decision making. However, in the prosecution setting, the use of objective standards is related to the very purpose for which independence is required — to reduce the likelihood of inappropriate considerations entering into the decision whether to lay and proceed on criminal charges. Objective standards have the added benefit of enhancing accountability in that they facilitate review of the original decision. A reviewing body can determine itself what is "reasonable" in the circumstances.

It is important, then, in the civilian setting, to remove any suggestion that the decision to prosecute is based on extraneous or oblique motives. However, the standards that apply to the decision whether to prosecute are just part of the picture. Also important are the characteristics of the decision maker. This means that the office held by the decision maker must permit him or her to act independently. The clearest example of the importance of this factor is provided by the judiciary. Judges must be provided security of tenure, salary and pension so they have no fear of reprisal from the executive for decisions taken in the exercise of their judicial authority. In the prosecution setting, as discussed in detail below, various jurisdictions employ different means of achieving both actual and apparent independence in the discharge of the authority to prosecute primarily by minimizing the possibility of political factors entering into the exercise of that authority.

Thus, there are two main aspects of independence to consider in determining whether a prosecution authority is in a position to act independently. The first is the existence of appropriate standards governing the decision to exercise that authority. The second is the set of attributes defining the office of the person exercising the prosecution authority. The next section describes some of the means taken to provide for and protect the independence of the prosecution authorities in various jurisdictions.

PROSECUTORIAL DISCRETION IN OTHER SETTINGS

The Civilian Context

As mentioned, there is a major emphasis on independence in prosecutorial decision making in the civilian setting. This is true in all common law jurisdictions, although the means taken to assure that independence varies. The following describes the functioning of two kinds of prosecutorial systems: one in which the attorney general has principal responsibility for prosecutions and another in which the director of public prosecutions has the principal authority in that area. As will be seen, one of the major goals of each system is the achievement of independence in the exercise of prosecutorial discretion.

The Attorney General Model. Much has been written about the role and function of an attorney general.[95] It is not the purpose here to discuss all of the facets of an attorney general's responsibilities. Rather, the concentration here is on the role of the attorney general as prosecutorial authority. In particular, the characteristics of the office of attorney general in exercising that discretion are relevant when considering the comparable prosecution function within the military.

The responsibilities of an attorney general (versus that of a minister of justice, for example) vary somewhat from jurisdiction to jurisdiction,[96] even though both roles are often performed by a single minister. For example, at the federal level, it is the responsibility of the Attorney General of Canada to provide legal advice to the government. On the other hand, in the provinces of Newfoundland, Quebec and Saskatchewan, this is a responsibility of the minister of justice. However, it is always the attorney general (however named) of the particular jurisdiction who is ultimately responsible for litigation matters generally and criminal prosecutions specifically. As will be discussed below, this is true even in jurisdictions that have created an office of director of public prosecutions.

While it is true that one of the primary functions of an attorney general is to supervise public prosecutions, this role can be broken down into a series of discrete activities. In fact, the attorney general is generally responsible for giving consent to the commencement of prosecutions (where required[97]), exercising the power to intervene in a private prosecution, deciding whether to prosecute, consenting to a non-jury trial for section 469 offences, preferring indictments and staying prosecutions. In practice, of course, individual prosecutors often make decisions about these actions. Still, it is the attorney general who is ultimately accountable

for decisions made by his or her agents. The role of an individual prosecutor and his or her relationship to the attorney-general was described in the report from the Marshall Inquiry.

The Role of the local Crown prosecutor

For the most part, the powers of the Attorney General are exercised by his agents, the local Crown prosecutors. Crown prosecutors are appointed by the Attorney General and must follow his or her instructions in carrying out their duties. In any prosecution, Crown prosecutors always act as the agent of the Attorney General, making them the local embodiment of the Attorney General's discretionary prosecutorial powers....

While the local Crown prosecutor is legally required to follow the lawful instructions of the Attorney General and is accountable for the conduct of any case, the local prosecutor has full responsibility for conduct of individual cases as a practical matter, and only in the most exceptional cases should an Attorney General or senior departmental officers become directly involved. The Attorney General, of course, remains ultimately accountable for the actions of the local prosecutors. This relationship was well described by Mr. John Clement, when in 1975, as Attorney General of Ontario, he stated that:

> The general supervisory power created in the evolution of the common law and confirmed by statute in Ontario means the local Crown Attorney must always be accountable to the Attorney General. However, it must be stressed that this accountability is part of the continuum. While a Crown Attorney is accountable to the Attorney General, in a very general sense, for his behaviour and activities in the administration of justice, the Attorney General is accountable to society specifically and answers in the Legislature for the entire process through which justice is administered in the province....

It has never been suggested, however, that the Attorney General assume responsibility for the day-to-day administration of justice. Under our system, the Attorney General is ultimately responsible to the people while local Crown Attorneys are granted a broad and generous area of unfettered discretion in criminal prosecutions. Subject only to very wide and general guidelines as to policy, the Crown Attorney is free to decide whether or not to launch a prosecution, the manner in which it will be prosecuted and how he will handle the matter at trial. In all these matters and in the general administration of justice within his jurisdiction, the Crown Attorney knows he has more than enough authority to respond adequately to the situations in which he is involved.[98]

As the person at the head of the prosecution authority, it is important that the attorney general act, and be perceived to act, within appropriate parameters. In other words, decisions about the handling of individual cases

must be free, and be perceived to be free, from extraneous influences. Most especially, given the status of the attorney general as an elected member of Parliament and cabinet minister, these decisions must be made without political influence. Decisions about whether a prosecution is justified, for example, must be made in light of the evidence and general public policy considerations, not political factors. Because the attorney general is both an elected politician and the chief law officer of the Crown, there is the potential for conflict between these roles. This issue was considered by the Marshall Inquiry and summarized as follows:

> As the chief law enforcement officer, the Attorney General bears a ministerial responsibility for decisions made by his Department and is accountable to the legislature....
>
> At the same time, other members of cabinet, who usually collectively share responsibility for decisions and directions of their colleagues, do not have to take any role or responsibility in connection with decisions the Attorney General makes in exercising his or her prosecutorial discretion. In fact, it is not constitutionally proper for them to direct those decisions. As law officer of the Crown, the Attorney General must exercise his or her prosecutorial function as an independent officer, independent of pressure from his or her cabinet colleagues. The prosecutorial decision is that of the Attorney General. The result is that the Attorney General occupies a position of independence unique among cabinet ministers.[99]

It is precisely because of the potential for political influence on the attorney general that some jurisdictions have created the position of director of public prosecutions (DPP), about which more will be said below. In fact, the royal commission on the Donald Marshall case recommended creation of a director of public prosecutions in Nova Scotia to overcome the shortcomings it found to exist in that province's legal system. The Commission was concerned about the leniency or special treatment afforded to political figures implicated in criminal misconduct while, at the same time, Donald Marshall's case received too little consideration. In particular, in deciding whether to commence a prosecution, the Nova Scotia Department of the Attorney General "require[d] substantially more likelihood of conviction before charging a politician than an Indian".[100] The Marshall Inquiry concluded that the creation of a more independent prosecution authority was needed to dispel the perception that the Department of the Attorney General showed favouritism based on social status.

> If there is a broadly held belief that the justice system, or one of its components, has handled a case unevenly or unfairly, that is a strong indication something is amiss. In such a

situation there is truth to the notion that perception becomes reality; like a cancer, it spreads insidiously throughout the community with debilitating and corrosive effects within and without the system.[101]

As important as independence is to the proper discharge of an attorney general's responsibilities, this characteristic must be balanced with accountability. It is important that the prosecution authority be answerable for his or her decisions, most appropriately to Parliament or the legislature. It was for this reason that the Marshall Inquiry rejected the idea of a DPP "who would be accountable to no one except his or her conscience and the law".[102] Similarly, the Law Reform Commission of Canada recommended creation of a federal DPP who would be appointed for a fixed term and removable for cause in order to ensure some measure of accountability.[103]

Given the kinds of actions that the prosecution authority may carry out in relation to criminal matters, it is easy to see why independence and accountability are so important. There are opportunities for the exercise of prosecutorial discretion from the very beginning of a case to the sentencing hearing. The very decision whether to prosecute an individual must be made free of political considerations. Otherwise, the principle of equality before the law, the mainstay of the Rule of Law, is tarnished. At the same time, there must be accountability for that decision. The public is entitled to an explanation why a particular prosecution was or was not begun.

Two main points from this discussion are most relevant to the military setting. First, there is a strong tradition in Canada that the exercise of prosecutorial discretion should be free of extraneous influences. In the civilian setting, because of the nature of the office of attorney general, the primary concern has been to ensure that political considerations do not influence prosecutorial decision making, particularly in relation to the decision whether to commence a prosecution. This concern has developed into a principle that the attorney general, although an elected politician and cabinet minister, has a special responsibility to consider only matters directly relevant to the prosecution function in the discharge of his or her discretion. The stipulation of what is relevant (and not relevant) is often in the form of prosecutorial guidelines, which are discussed and described in detail below.

The second point, which indirectly reinforces the first, is that the individual decision maker in the civil setting is given a large measure of autonomy. This is partly for practical reasons. The attorney general could not be expected to personally make all the decisions relating to the exercise of the prosecution function. There is, however, a basis in principle for giving a broad discretion to individual prosecutors. It helps achieve the

desired independence in prosecutorial decision making by moving the locus of authority from the political level (i.e., the attorney general) to the community level. This makes it less likely that the political forces that an attorney general might feel will be brought to bear on prosecutorial decisions. Of course, it raises the possibility of local political forces influencing prosecutions which, again, is solved in part by the the creation of guidelines for the exercise of prosecutorial discretion.

An additional advantage of giving autonomy to individual prosecutors is that it helps ensure that local conditions and circumstances form part of the decision-making process. As discussed below, one of the main factors to consider in deciding whether to begin a prosecution is the public interest. Whether a prosecution is in the public interest will often be influenced by the impact the prosecution might have on the local community. An individual prosecutor who resides in that community will usually be better placed to make that determination than an attorney general.

This significance of these two points in the assessment of the prosecution function in the military setting will be discussed below.

The Director of Public Prosecutions Model. The office of director of public prosecutions originated in the United Kingdom in 1879. It was created as a means of establishing a more regular system of prosecutions than had existed previously. Prior to that and, as it turned out, for a considerable period thereafter, prosecutions were mainly private or initiated by the police who would instruct their own counsel. The problem with this approach was that the system of private prosecutions did not provide an adequate degree of consistency or responsiveness to the public interest. There was an additional concern about the combination of investigatory and prosecutorial roles. In 1985[104] the English DPP was actually established as the head of the Crown Prosecution Service and made responsible for public prosecutions. Until then, the DPP was only responsible for relatively minor prosecutions.

Thus, the motivation for establishing an office of DPP in England was not to create a more independent prosecution authority. In fact, the DPP of England and Wales is not really independent of the attorney general. However, some jurisdictions have drawn on the English system and have incorporated a DPP into their prosecution system out of a recognition that it offers the potential of securing greater independence in prosecutorial decision making. The degree to which the DPP model offers enhanced independence depends on how the office is structured. Independence can be protected if the relationship between the attorney general and the DPP

is set out in statute and the degree to which the attorney general can influence the DPP's discretion is limited.

Nova Scotia was the first Canadian jurisdiction to create a DPP in statute.[105] As discussed above, this came about as a result of the royal commission on the Donald Marshall case. The commissioners felt there was a need to reinforce the independence of the prosecution authority in that province in order to quell the perception that persons of influence enjoyed privileged treatment by prosecutors.

This independence was created by limiting in statute the degree to which the Attorney General of the province may direct the actions of the DPP, who has primary authority over prosecutions. The Nova Scotia *Public Prosecutions Act* provides that the Attorney General is accountable to the legislature for public prosecutions but states that the Attorney General's role amounts to:

- issuing published general instructions or guidelines, after consultation with the DPP;
- providing advice to the DPP, which the DPP is not bound to take;
- consulting with Cabinet on prosecution matters generally, not individual cases; and
- exercising statutory powers relating to prosecutions, after consultation with the DPP.

The DPP is given express power to conduct prosecutions independently of the Attorney General, but has an obligation to adhere to published guidelines and instructions issued by the Attorney General. To date, directives and guidelines have been issued in relation to the following matters, among others:

- investigation and prosecution of cases involving persons with special communication needs;
- appeals to the Court of Appeal;
- spousal assault;
- additional investigation and reinvestigation;
- exercise of prosecutorial discretion; and
- disclosure by the Crown.[106]

The advantage of a model along these lines is that the attorney general discharges his or her duties as the minister of the Crown responsible for prosecution matters and the administration of justice in the province

generally while the DPP deals with individual cases on their merits. It optimizes independence and accountability in relation to the exercise of the prosecution function.

Several other commonwealth jurisdictions, including Ireland, Australia and most Australian states have established DPPs.[107] In these jurisdictions, there are significant variations in the attributes of the office that need not be described in detail for present purposes.[108] The point is that the characteristics of the office of the DPP can be attuned to local needs and expectations. Those aspects of the office that relate to the independence of a director of public prosecutions are, however, worthy of note.

The main features of an office of the DPP fall into in three categories. The first category includes issues relating to the appointment of the DPP: the criteria of eligibility for appointment, the appointment process itself and the tenure of the officeholder. The second category includes the actual functions and responsibilities of the DPP. The third category includes matters relating to the relationship between the attorney general and the DPP.

Usually, a DPP is appointed by Cabinet. In two jurisdictions, a role is provided for persons outside government in determining the suitability of candidates. In Ireland, for example, the DPP is appointed by the government[109] on the basis of candidates recommended by a committee made up of the chief justice, chairman of the bar, president of the law society, secretary to the government and the senior legal assistant to the attorney general.[110] In Nova Scotia, the DPP is "appointed by the Governor in Council" after consultation with the Chief Justice of [Nova Scotia], the chief justice of the Trial Division of the Nova Scotia Supreme Court and the executive of the Nova Scotia Barristers' Society".[111] The main point is that the DPP is not appointed by the attorney general alone which helps ensure that the DPP is not merely a surrogate of the Attorney General.

For independence to be meaningful, the DPP must also have some security of tenure. Otherwise, it would be a simple matter for a government to discharge a director who, in the proper exercise of the prosecution authority, took decisions with which members of the government disagreed or which somehow embarrassed the government.

There is considerable range in the tenure provided for in legislation setting up the office of DPP in various jurisdictions. Some jurisdictions set fixed terms of office (Australia, Australian Capital Territory, Western Australia, Northern Territory), some leave the term open, to be negotiated with each director on appointment (England and Wales, Ireland, Queensland) and some provide for indeterminate tenure during good behaviour until retirement (Nova Scotia, New South Wales, Victoria,

Northern Territory[112]). The Law Reform Commission of Canada recommended that a federal DPP be appointed for a fixed renewable term of 10 years.[113]

There are also means for removing a DPP who is not performing the functions and responsibilities of the position. The Australian statutes typically set out the grounds on which a director may be removed from office. Grounds include such matters as physical or mental incapacity, undue absence, engaging in other forms of employment, general misbehaviour and insolvency. The *Nova Scotia Public Prosecutions Act* provides that the director holds office during good behaviour and is removable only for cause after a resolution is passed in the Legislative Assembly.[114] This is akin to the security of tenure offered to the judiciary in Canada. In that context, as here, the goal is to prevent officeholders from tailoring their conduct to the wishes of the government. In other words, security of tenure fosters independence.[115]

It is in the relationship between the attorney general and the DPP that issues relating to the independence and accountability of the DPP are most visible. As mentioned, in all jurisdictions described above, the attorney general retains ultimate responsibility for matters relating to prosecutions even though the DPP is given primary responsibility for actually carrying out those prosecutions. This is clearer in the legislation of some jurisdictions than in others. For example, in Nova Scotia, the enabling statute states clearly that the Attorney General is responsible for the prosecution service and is accountable to the legislature for it.[116] For England and Wales, the matter is put another way in that the applicable statute provides that the DPP shall discharge his or her functions under the superintendence of the Attorney General.[117] In New South Wales, it is provided that the DPP is responsible to the Attorney General but that this fact does not derogate from the DPP's authority in relation to prosecutions.[118] In Queensland, the DPP is responsible to the Attorney General.[119]

The purpose of this discussion of the various models of prosecution authorities in the civilian context is to illustrate the lengths to which common law jurisdictions have gone to preserve the independence of those authorities and, thereby, to ensure that the exercise of discretion in the laying and prosecution of charges is governed by appropriate considerations. The principal objective is to reduce the risk of extraneous factors influencing the course of criminal prosecutions and, thereby, minimizing the possibility of misuse of the state power to charge, prosecute and punish individuals. In doing so, the interests of equality of treatment and fairness are protected.

The motivation for creating the office of director of public prosecutions in most of the jurisdictions where it exists was principally to guard against the possibility and, therefore, the perception that political factors might influence the exercise of prosecutorial discretion. This is obvious in the Nova Scotia case, for example. This concern is not confined to the jurisdictions where DPPs in fact exist. As was seen in the preceding section, the independence of the attorney general and of individual prosecutors is fundamental to the administration of criminal justice in the common law world. In jurisdictions where a DPP exists, that concern has been formalized in the statutes creating that office.

The means by which prosecutorial decision making is actually structured, in jurisdictions with and without a DPP, is often by way of prosecution guidelines. A discussion of the use and content of such guidelines follows.

Guidelines and Standards. There are serious issues of policy, not just evidence, in the exercise of prosecutorial discretion. For example, many jurisdictions have policies on the commencement of prosecutions in relation to spousal assaults.[120] Obviously, the prosecution authority must be accountable for these policies (or the failure to develop them). The standard considerations in making the decision whether to prosecute are whether, based on the evidence, there is a likelihood of conviction, and whether it is in the public interest to prosecute. The latter is obviously a flexible standard, one which may consider a variety of factors, including local conditions and circumstances. The Law Reform Commission suggested that the Attorney General of Canada should promulgate guidelines on the factors to be considered in deciding whether to commence a prosecution. The Commission stated that the guidelines should include reference to the following: (1) whether the public prosecutor believes there is evidence whereby a reasonable jury properly instructed could convict the suspect; and if so, (2) whether the prosecution would have a reasonable chance of resulting in a conviction. The prosecutor should also take into account: (3) whether considerations of public policy make a prosecution desirable despite a low likelihood of conviction; (4) whether considerations of humanity or public policy stand in the way of proceeding despite a reasonable chance of conviction; and (5) whether the resources exist to justify bringing a charge.[121]

These are obviously general considerations, not prescriptive rules. Still, they serve as a basis for discussion about whether a particular prosecution would be well-advised. The existence of a discretion whether to prosecute flows from the general principle that not all offences need to be prosecuted.

The classic statement on this subject was made in 1951 by Sir Hartley Shawcross, QC, then Attorney General of England:

It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should prosecute "whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration.[122]

In addition to the recommendations of the Law Reform Commission of Canada, there have been other calls for structuring the decision making relating to prosecutions in recent years in Canada. An example is the report from the Marshall Inquiry. The commissioners emphasized the importance of independence in the exercise of the prosecution function.

Ultimately, the integrity of the administration of justice depends on the integrity, independence, character and professional competence of the law officers of the Crown.

Nothing is more calculated to engender disillusionment with the criminal justice system and its constituent parts — the police, prosecutors, judges or the executive branch of government — than disclosures indicating a susceptibility to extraneous pressures. I have no doubt in my mind that the greatest safeguard against the sullying of the pillars of justice is to be found in the integrity and independence of the individuals who, in their respective capacities, have to administer the several parts of the system. Without these personal qualities any structure is extremely vulnerable. The responsibility of government is to create the kind of machinery that will assist, rather than prejudice, the fulfillment of those ideals which are essential to maintaining public confidence in the criminal justice system.[123]

The commissioners went on to recommend the creation of the office of director of public prosecutions in the province of Nova Scotia to assure that independence.[124] They also recommended the promulgation of guidelines for the exercise of the decision to prosecute.

The Crown bears the final burden of deciding whether a prosecution will actually take place. Although the police usually only lay a charge after a proper investigation and after the Crown, at least in complex cases, agrees there is sufficient evidence to sustain a conviction, the Crown remains the guardian of the public interest — occasionally it may be decided that the public interest requires that an otherwise well-founded prosecution should not proceed...

While decisions to discontinue a prosecution in the "public interest" must be made on a case-by-case basis, there should be clear direction on what types of considerations are properly in the public interest. At present, there is no such direction in Nova Scotia. In exploring this subject in his research, Professor Archibald found that:

> responses to the Crown Survey give great cause for concern. They indicate on the part of many prosecutors a basic lack of understanding of what has traditionally been conceived of as an important aspect of the exercise of prosecutorial discretion. This may be attributable to an inadequate grounding in criminal law theory during their basic legal training. However, it is clear that the Department of the Attorney General is not correcting this misconception over public interest factors in the prosecution of offences. The Blue Binders of "Advice to Prosecuting Officers" do not address these issues and the apprehensiveness of the Director (Prosecutions) on the issue would not lead one to conclude that matters are being clarified regularly in other ways...to prevent injustices and the costs of needless prosecutions, a public interest policy ought to be developed. Such policies have been developed in England, Australia and the United States, and provide a rational basis for identifying the public interest factors which should lead a prosecutor not to prosecute even where the evidence would allow it.[125]

The commissioners went on to recommend that the Attorney General "promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction." They suggested a set of factors that would be relevant to the question whether a prosecution was in the public interest.[126] Some of the broad public interest factors identified by the commissioners included these recommendations:

- the likely effect of a prosecution on public order and morale [Recommendation 38(b)(v)];
- the prevalence of the alleged offence and any related need for deterrence [38(b)(ix)]; and
- the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice [38(b) (xvi)].

The commissioners also identified factors that should clearly not form part of the decision whether to prosecute. Notable among them are:

- the prosecutor's personal feelings concerning the victim or the alleged offender [Recommendation 38(c)(ii)]; and

- the possible effect on the personal or professional circumstances of those responsible for the prosecution decision [38(c)(iv)].[127]

Similarly, in Ontario, the Martin Committee in its *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*[128] recommended that a set of guidelines be put in place to govern the exercise of the prosecution function in Ontario.

> It is a fundamental principle of the administration of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest.
>
> The question of what standard to apply when determining the sufficiency of evidence and the public interest in prosecuting is an extremely important one. In the Committee's view, the proper standard, or proper threshold test, must be one that does not unduly restrict Crown counsel, prosecutorial discretion, but at the same time prevents the process of the criminal law from being used oppressively, where there is no realistic prospect of a conviction on the evidence. The prosecution must also be in the public interest. Crown counsel, when assessing whether it is in the public interest to recommend commencing criminal proceedings against a person, or discontinuing criminal proceedings against an accused, must take into account more than the sufficiency of the evidence against that person: all relevant circumstances must be considered, keeping in mind that "the contemporary view favours restraint generally in the exercise of the criminal law power."[129]

The Martin Committee guidelines are set out in the appendix to this paper. The Committee proposed that the threshold test for commencing or continuing a prosecution should be whether the evidence discloses a "reasonable prospect of conviction." Like the Marshall Inquiry, the Martin Committee recommended that prosecutors take into account, in deciding whether to prosecute, certain broad public interests such as:

- the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order; and
- national security and international relations.[130]

Many jurisdictions, including Canada, have actually adopted extensive guidelines on the exercise of prosecutorial discretion. The federal *Crown Counsel Policy Manual*,[131] for example, contains a comprehensive set of guidelines relating to the decision whether to prosecute. These are set out in the appendix to this paper. The following commentary accompanies the guidelines:

The Decision to Prosecute

Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system...

Counsel must consider two main issues when deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?

Sufficiency of the Evidence

In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable prospect of conviction*. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law...

Crown counsel are expected to apply this evidential standard throughout the proceedings — from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable — especially in borderline cases — to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will succeed. Nonetheless, counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction.

Among the broad public interest criteria identified in the federal guidelines are the following:

- the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;
- the prevalence of the alleged offence in the community and the need for general and specific deterrence; and
- whether the alleged offence is of considerable public concern.

The federal guidelines also set out criteria that are irrelevant to the decision whether to prosecute including:

- Crown counsel's personal feelings about the accused or the victim; and
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

Other common law jurisdictions have also established guidelines to govern the decision to prosecute. The Crown Prosecution Service in the United Kingdom publishes its *Code for Crown Prosecutors*[132] that contains detailed guidelines and a set of general principles (see the appendix to this paper). Among them is the following.

Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must also not be affected by improper or undue pressure from any source.

Guidelines also exist for the exercise of the prosecution function by the director of public prosecutions for the Commonwealth of Australia.[133] The following are some of the general factors affecting the decision to prosecute contained in the Australian guidelines.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

It follows that the objectives previously stated — especially fairness and consistency — are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

The guidelines refer to such broad public interest factors as:

- the effect on public order and morale;
- whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- the prevalence of the alleged offence and the need for deterrence, both personal and general;
- whether the alleged offence is of considerable public concern; and

- the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The following matters are among those cited in the Australian guidelines as inappropriate considerations in deciding whether to prosecute:

- personal feelings concerning the alleged offender or the victim; and
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

In addition to guidelines at the state level, there also exist international standards governing the exercise of prosecutorial authority. United Nations guidelines were developed at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders.[134] The purpose of these standards was to set out minimum rules respecting the behaviour and powers of public prosecutors, recognizing the important societal role performed by them.

The Preamble to the Guidelines on the Role of Prosecutors makes it clear that the role of prosecutors is crucial in furthering the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal. Accordingly those selected as prosecutors must be individuals of integrity and ability, with appropriate qualifications and training. The Guidelines address, inter alia, status and conditions of service, freedom of expression and association, the role of prosecutors in criminal proceedings, rules or regulations to guide the exercise of discretion, alternatives to prosecution, relations with other agencies including the courts, defence and police, disciplinary proceedings and the obligation to observe the guidelines and report violations.[135]

The contents of the UN guidelines are set out in the appendix to this paper. For present purposes, it is interesting to note the following attributes of public prosecutors identified in the UN guidelines.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.

2. States shall ensure that...

   (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory

> protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Among the obligations prosecutors should shoulder, the UN guidelines provide that prosecutors must:

> Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.

The UN guidelines also provide that states should "provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution."

Summary. It is clear from the foregoing that there are important matters of policy involved in the exercise of prosecutorial discretion. These matters fall generally under the rubric of "public interest" factors. The Marshall Inquiry, the Law Reform Commission of Canada and the Ontario Attorney General's Martin Committee all recommended that these factors be expressed in guidelines to prosecutors in order to reinforce the independence of those making decisions relating to the prosecution function by stipulating what the appropriate considerations should be. The factors that should and should not form part of the decision whether to prosecute have in fact been put in place in several jurisdictions, including Canada.

In addition to matters of public policy in this area, there remains the other principal consideration — the weight of the evidence supporting the prosecution's case. To make a determination as to whether there is sufficient evidence to justify commencing a prosecution, one must obviously have a solid understanding of the requisite elements of offences and the laws of evidence. This means that prosecutors must possess both substantive legal knowledge and, in the public interest aspect of their functions, sound judgment. The importance of the prosecutor's role and the attributes necessary for its proper discharge have been recognized in minimum standards of the United Nations. Those standards specify that prosecutors "shall be individuals of integrity and ability, with appropriate training and qualifications" and be "aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law."

It is against this background that the prosecution function within the military justice system, including the pivotal role of commanding officers, must be assessed. First the operation of the prosecution function within the military justice systems of other countries is examined.

Other Jurisdictions

There are some aspects of the military justice systems of other countries that serve to enhance independence in the prosecution of offences and are worthy of note here. As mentioned above, in the United Kingdom, civilian police officers play a major role in the military justice system.[136] This helps ensure that the standards and procedures provided for in the civilian setting are applied in the military context. The role of the Royal Military Police is clearly to support the command.[137] Yet, where there is any interference with the independence of policing functions, Royal Military Police officials may bring the matter to the attention of the adjutant general and a parliamentary committee. It should also be noted that in the United Kingdom, the prosecution authority in the military is the convening officer, not the commanding officer. In the *Findlay* case before the European Commission on Human Rights, the Commission expressed disfavour with the role of the convening authority in the U.K. military justice system. The convening authority decides the nature of the charges against the accused. The convening authority also decides the form of the court-martial to be established. In *Findlay*, the applicant argued that a court-martial was not independent of the prosecuting authority (i.e., the convening authority) because the members of the court-martial were serving members of the army and were under the command of the convening authority. The Commission concluded that the court-martial lacked independence from the prosecuting authority.[138] Reforms to the U.K. system are now being contemplated.[139]

As described above, the Australian system resembles the Canadian one in that most service offences are dealt with by and within the jurisdiction of commanding officers. However, investigations by military police are conducted independently from the chain of command. Still, it falls to commanding officers to decide what action to take on reports of the military police.[140] There are reforms being contemplated to the Australian military justice system not unlike those under consideration in the United Kingdom. These are discussed further below.

In the United States, a special military policing unit, the Criminal Investigation Division (CID), deals with all serious criminal offences.

Other units refer appropriate matters to the CID for investigation. Less serious matters are dealt with by the command structure as in the Canadian system. Even there, however, measures exist to reduce the likelihood and the effects of inappropriate command influence.

In many ways the U.S. military justice system resembles its Canadian counterpart. For example, commanders are the key persons in the U.S. system as in the Canadian.[141] On the other hand, under the U.S. system, anyone can lay a charge — even a junior soldier against a senior officer. This cannot occur in the Canadian system. The U.S. system has also made attempts to eradicate some forms of "command influence" from it. Some forms of command influence are expected and tolerated. Other forms are not.

There are two means that have been employed in the United States to protect against unwarranted command influence. The first is direct. Unlawful command influence is prohibited under the Rules for Court-Martial. It is an offence to influence the findings or the sentencing process of a court-martial.[142] In addition, it is an offence to fail to abide by the rules governing a court-martial.[143] As such, a commander is unlikely to fail to follow the rules governing the laying of charges or the commencement of proceedings.

The other means of dealing with unlawful command influence is indirect. Commanders are trained in this area and are given guidelines on how to discharge their responsibilities. The following are some of those guidelines in the form of "10 Commandments":[144]

Commandment 1: The Commander may not order a subordinate to dispose of a case in a certain way.

Commandment 2: The Commander must not have an inflexible policy on disposition or punishment.

Commandment 3: The Commander, if accuser, may not refer the case.

Commandment 4: The Commander may neither select nor remove court members in order to obtain a particular result in a particular trial.

Commandment 5: No outside pressures may be placed on the judge or court members to arrive at a particular decision.

Commandment 6: Witnesses may not be intimidated or discouraged from testifying.

Commandment 7: The Court decides punishment. An accused may not be punished before trial.

Commandment 8: No person may invade the independent discretion of the military judge.

Commandment 9: The commander may not have an inflexible attitude towards clemency.

Commandment 10: If a mistake is made, raise the issue immediately.

The actual content of these commandments is not entirely applicable in the Canadian context because the role of commanding officers differs somewhat from that of commanders in the U.S. system. Still, they provide an example of how the discretion of commanding officers can be informed by guidelines and how inappropriate conduct relating to the exercise of discretion can be curtailed.

Guidance on the exercise of discretion is also provided by the Rules for Court-Martial. The discussion accompanying Rule 306(*b*) states:,[145]

> The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offences, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, *the interest of justice* military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.
>
> In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:
>
> (A) the character and military service of the accused;
>
> (B) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
>
> (C) appropriateness of the authorized punishment to the particular accused or offense;
>
> (D) possible improper motives of the accuser;
>
> (E) reluctance of the victim or others to testify;
>
> (F) cooperation of the accused in the apprehension or conviction of others;
>
> (G) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
>
> (H) availability and admissibility of evidence;
>
> (I) existence of jurisdiction over the accused and offense; and
>
> (J) likely issues.

Thus, an effort has been made in the United States to guide the discretion of commanders and to minimize the effect of one potential source of extraneous influence in the process, namely command influence. However, as in Canada, the general public interest is given little attention. There is only one reference to public interest (i.e., the interest of justice) in the factors to be taken into account by commanders in deciding whether to prosecute.

PROSECUTORIAL DISCRETION IN THE MILITARY SETTING

As seen from the earlier description of the Canadian military justice system, the role of the commanding officer is pivotal and multifarious. At various points, the commanding officer acts as supervisor of an investigation, a justice issuing search warrants, a justice at a preliminary inquiry (in determining whether there is an evidentiary basis for proceeding on a charge), and a prosecutor and judge (in summary trials). In executing each of these decision-making roles, the commanding officer has a large measure of discretion.

A court-martial convening authority acts like a senior Crown attorney or even an attorney general or DPP in that the decision whether to proceed to trial on a particular charge by appointing a court-martial falls to him or her. In addition, the convening authority appoints the prosecutor. The prosecutor, usually a legal officer in the Office of the Judge Advocate General, presents the state's case before the tribunal.

The chief military trial judge acts like a chief justice in that he or she appoints the judge advocate for the court-martial. In addition, the chief military trial judge appoints the president and the other members of the court.

In terms of exercising prosecutorial authority, the role of the commanding officer is obviously paramount. It is the commanding officer who decides how to respond to misconduct, including whether it may be dealt with informally or through administrative or penal consequences. If the commanding officer determines that a charge should proceed, the court-martial or summary trial, as the case may be, will take place. Accordingly, it falls primarily to the commanding officer to characterize the conduct, determine its significance in legal terms, weigh the evidence, select the charges (if any), contemplate the anticipated punishment and, then, either try the matter or refer it to a higher authority for trial or a court-martial. The discretion available to the prosecutorial authorities in the military is virtually open-ended. There is no stipulation of the quantity of evidence that must be present before charges may proceed. Nor is there any articulation of other considerations that should be taken into account.[146]

The breadth of the powers of the commanding officer greatly exceed those of a prosecutor in the civilian setting. For example, the civilian prosecutor's role is informed and limited by the functioning of an independent police force with primary responsibilities for investigations and the laying of charges. Further, the civilian prosecutor has no judicial functions comparable to those exercised by commanding officers.

Yet, in the civilian setting, even with the comparatively narrow ambit of the decision-making powers of prosecutors, there has been sufficient concern about the proper exercise of that discretion that great lengths, (described above) have been taken to structure and guide that discretion in a variety of ways such as through a tradition of attorney general independence; by creating, in some jurisdictions, an office of director of public prosecutions as an additional means of shielding prosecutorial decision making from external influences; by establishing and publishing guidelines setting out the factors that are relevant and those that are not relevant to the exercise of prosecutorial discretion; and by promulgating minimum standards and guidelines in an international instrument.

The comparison between the military and the civilian systems is stark. There is no comparable attempt in the military setting to ensure that prosecutorial discretion is exercised on appropriate grounds. There has been no comparable effort to structure or guide the discretion exercised by the commanding officer. As far as we have been able to ascertain, there are no established standards governing the exercise of prosecutorial discretion by commanding officers in the military justice system.

The obvious question is whether the differences between the civilian and military settings are so distinct as to justify these very different approaches to the exercise of prosecutorial authority. If there is a justification for these differences, it must lie either in the very purposes of the separate system of military justice (i.e., the promotion of good order and discipline in the Canadian Forces) or in the exigencies of administering justice in a military setting. We will return to this question after discussing in greater detail the differences between the civilian and military systems of prosecution.

The Significance of Independence in Military Prosecutions

As discussed above, underlying the concept of independence in prosecutorial discretion is the idea that decisions affecting the use of such a powerful measure as a prosecution should be taken only on appropriate grounds. To permit otherwise would be to allow abuses of that power to take place and to harm equality and fairness interests. The major

preoccupation in the civilian setting has been in relation to the possibility of political interference in the exercise of prosecutorial discretion.

The question here is whether there is any basis for similar concerns in the military setting. To state the obvious, it is not the Attorney General of Canada who has plenary responsibility for the prosecution function in the military justice system. As such, the specific concern about political influences being applied to the Attorney General is not relevant in the military context. However, the Minister of National Defence does play a role in the military justice system. The Minister is at the apex of that system and has particular powers and responsibilities within it. For example, the Minister of National Defence has the power to "mitigate, commute or remit" any punishment imposed by a service tribunal,[147] or quash or substitute findings or punishments made or imposed by a tribunal.[148] The Minister may also set aside a finding of guilt and order a new trial where the Judge Advocate General certifies that there has been an"irregularity in law."[149] Thus, the Minister has direct responsibilities within the military justice system and, in addition, is accountable for its overall operation.

Given this role of the Minister of National Defence and the fact that, like the Attorney General of Canada, the Minister is an elected official and a Cabinet minister, there are grounds for an equivalent concern about the possibility of political factors influencing the exercise of prosecutorial discretion in the military justice system as exists in the civilian setting. However, if such a concern does exist, it is not reflected in any specific policies or other mechanisms governing the military justice system.

There are other potential sources of influence on the exercise of prosecutorial discretion in the military that must also be considered. An obvious one is the command structure. In a sense, it is anomalous to think in terms of "command influence" as an external force that may affect the decision making of a commanding officer. After all, a commanding officer is *part* of the command structure. The decision to prosecute is a decision within the authority of the command itself. In that sense, so long as prosecutorial authority is vested in commanding officers, there is no escaping command influence on the prosecution function.

There is another aspect of command influence, however, that must be considered — the extent to which decisions about prosecutions are taken because of direct instructions given by more senior officers to commanding officers or in anticipation of the expectations of those senior officers. This aspect of command influence operates at the level of the individual commanding officer and, therefore, is discussed below.

The Commanding Officer as Local Prosecutor

As discussed above, in the civilian setting, the delegation of the decision-making powers of an attorney general to local prosecutors actually increases the independence of prosecutorial decision making by helping ensure that the political forces that may be applied to an attorney general are not felt by those making decisions about prosecutions on a daily basis. This is particularly true, of course, in jurisdictions with a DPP. The other advantage of giving local prosecutors a large degree of discretion is that it fosters consideration of community interests. In other words, in assessing the public interest, the local prosecutor can take into account the particular interests of the affected community.

The question, then, is whether there are similar advantages in the military setting in giving a large degree of discretion to commanding officers in their prosecutorial role. As in the civilian system, there is no doubt an advantage in devolving primary decision making away from the responsible minister in order to diminish the possibility of political influences affecting prosecutorial decisions. The difference is that in the civilian setting this arrangement is reinforced by other mechanisms, such as a strong tradition of attorney general and prosecutorial independence, institutional structures and, often, published guidelines governing prosecutorial decision making. Independence is, therefore, augmented in the civilian setting by a combination of mechanisms. Merely giving local prosecutors a large measure of autonomy would not contribute significantly to prosecutorial independence in the absence of these other factors.

As for considering the impact of prosecutorial decisions on the "community" this is obviously one of the main reasons for giving commanding officers the powers they have. The very purpose of the role commanding officers play in the military justice system is to advance the good order and discipline of the Canadian Forces. This is not a role that can be performed in an abstract or generalized way. It must be attuned to the particular circumstances of the unit, element or command in which misconduct occurs. The commanding officer must take account of the context in which that conduct takes place and respond to it in a manner that, in those precise circumstances, will augment good order and discipline.

In defence of the commanding officer's role as prosecuting authority in the United States, one author stated.

> Leaving prosecutorial discretion in the hands of the commanding officer will best serve the ends of justice *and* discipline. The military commander has a broader range of alternatives

available for handling a case than does the civilian prosecutor. He appears also to have access to far more information about the individual accused, through extensive records, information from supervisors, and often (at smaller commands) personal familiarity with the accused. The combination of this range of options, wealth of information, and the legal advice of his trial counsel places him in an ideal position to exercise his prosecutorial discretion in a just manner. Certainly, no one is in a better position then to judge the disciplinary implications of his decision:

> The commander alone is responsible for the performance of the mission assigned to the command. He is also the person who has the greatest knowledge of the needs of the military community and the personality and needs of individual offenders within that community. With that responsibility and possessing that special knowledge he should also have the authority to determine the offenses to be brought to trial and the level of court-martial to try those offences.

It is not time for a change.[150]

However, there is a significant difference between the local prosecutor who considers the interests of the community in which he or she serves and the commanding officer who must consider the functioning of his or her troops. In the case of the commanding officer, he or she is, in a sense, responsible for the behaviour of the population whose conduct is in issue. Accordingly, misconduct carried out by a service member may reflect poorly on the commanding officer. It may indicate that the commanding officer has been insufficiently vigilant about less serious forms of misconduct when they happened in the past and, subsequently, matters got out of hand. It may mean that past measures put in place by the commanding officer to achieve compliance and promote good order and discipline were inadequate. It may indicate that the commanding officer's orders were not clear. Or, perhaps the commanding officer set a poor example. In short, misconduct may reflect on the leadership qualities and skills of the commanding officer.

These kinds of inferences are possible in the military context, depending of course on the circumstances of any actual wrongdoing, but not in the civilian setting. The difference is that the discipline and good conduct of service members are the responsibility of commanding officers. Where there is a breakdown, it may be explained, in some cases, by the failure of commanding officers to achieve what is expected of them. By contrast, it cannot be said that civilian prosecutors are responsible for the conduct of individuals in the community in which they serve.

This situation is exacerbated in the military setting by the fact that commanding officers have both prosecutorial and policing roles. The

commanding officer is responsible for determining what the police response should be to misconduct and, accordingly, is responsible for the enforcement of the laws particular to the military setting as well as laws of general application. As such, where misconduct occurs, it may reflect on the conduct of the commanding officer in relation to his or her enforcement responsibilities or prosecutorial role, or both. Again, this is not the case in the civilian setting where enforcement of the law is the responsibility of an independent police force, not the prosecutor.

This difference between the military and civilian settings is significant. It means that misconduct in the military may reflect on the person who has primary responsibility for prosecuting the authors of that misconduct. Naturally, where that is so, it may affect how that person (i.e., the commanding officer) responds to it. It may incline the commanding officer to fail to prosecute so as not to bring attention to the offence. It may cause the commanding officer to deal with the conduct personally, rather than referring it to a higher authority, for the same reason. On the other hand, the commanding officer may respond forcefully to the misconduct to demonstrate control over the situation and repair what may have been, theretofore, a lax approach to discipline.

To raise these possibilities is not to suggest in any way that the main concern of commanding officers in executing their prosecutorial responsibilities is self-interest. Rather, it is simply to suggest that among the many considerations that commanding officers must take into account, their own situation may, unconsciously or otherwise, figure as well. It is part of the reality of the military that commanding officers have responsibility for the persons within their command and, simultaneously, must be accountable to the next person up the chain of command. In addition, because of this hierarchical structure, the same may be said for those higher authorities who execute functions in the military justice system as superior commanders, convening authorities or commanding officers. Thus, the problem of "command influence" may arise because there is a potential for the interests of superior officers in the chain of command to be brought to bear on the exercise of discretion by a commanding officer, whether overtly or implicitly.

As such, it would appear that in the military setting there is at least a risk that prosecutorial decisions may be influenced by the self-interest of commanding officers. This concern does not arise in relation to prosecutors in the civilian setting. It derives from the particular nature of the relationship between the commanding officer and service members.

Relevant Factors Affecting Prosecutorial Discretion in the Military

Throughout this paper, there has been repeated reference to factors that are "relevant" or "appropriate" to prosecutorial decisions. We have seen, that in the civilian setting, many jurisdictions have articulated these factors in published codes.

There is no equivalent of these civilian codes within the military justice system. It is fair to assume, however, given the purpose of a separate military justice system, that decisions about prosecutions are taken in the public interest, *including* the public's interest in having a well-functioning and prepared military. In other words, the good order and discipline of the military is included within the broader public interest.

The degree to which the public interest in its broad sense is engaged will vary with the seriousness of the offence. For example, in respect of pure service offences, the public interest beyond the disciplinary aspect of those offences is affected very little. At the other end of the spectrum, where the conduct may involve serious offences against the person, there is a very clear public interest in how the matter is dealt with. In the middle range is a vast array of offences for which there is a mixture of disciplinary aspects and broader public interests. It falls to commanding officers to respond appropriately to the full range of offences covered by the Code of Service Discipline.

For those offences where there is a significant public interest involved, commanding officers should, presumably, have regard for the kinds of factors public prosecutors take into account when deciding whether to prosecute. The federal *Crown Counsel Policy Manual*[151] refers to many factors (in addition to the requirement of sufficient evidence), most or all of which would appear to be relevant in the military setting, although their meaning, priority and application would no doubt be different. Similarly, the factors set out in the *Crown Counsel Policy Manual* that would clearly not be relevant to prosecutorial discretion in the civilian setting appear equally to have no application in the military context.

Thus, commanding officers clearly have a difficult task as prosecutors. They must respect the goal of achieving good order and discipline and, in many cases, act simultaneously as guardians of the broader public interest. Most of the factors that are relevant to that role in the civilian setting would appear to apply equally in the military context, although the manner in which they apply may differ because of the additional goal of achieving good order and discipline in the military. There is, however, no

obligation on commanding officers to apply such factors in discharging their prosecutorial responsibilities.

This comparison of civilian and military prosecutorial responsibilities may give rise to concerns about the exercise of prosecutorial discretion by commanding officers. Possible areas of concern will be canvassed below. First, however, a discussion of the particular difficulties that were revealed in one of the prosecutions arising from events in Somalia is required.

PROSECUTORIAL DECISION MAKING IN RELATION TO EVENTS IN SOMALIA

The following is a chronology of events in the prosecution of Pte E. Kyle Brown.[152]

Prior to the Laying of Charges Against Pte Brown

March 16, 1993	Torture and killing of Shidane Abukar Arone in the Canadian military compound near the city of Belet Huen, Somalia.
May 8, 1993	LCol J.C.A. Mathieu, commanding officer, was interviewed under caution as a possible suspect in relation to the events surrounding a shooting incident that took place on March 4, 1993.
May 19, 1993	Maj MacKay charged Pte Brown for the March 16, 1993 incident.
June 1-22, 1993	Maj MacKay and five other majors were interviewed by the military police in relation to orders they were alleged to have received from LCol Mathieu in January 1993 in Somalia, concerning the use of deadly force.

The Laying of the Charges Against Pte Brown and Subsequent Events

June 18, 1993	LCol Mathieu signed the charge sheet of Pte Brown dealing with the March 16, 1993 incident.
July 21, 1993	MGen Vernon (Commander of Land Force Central Area), acting as the convening authority, directed that Pte Brown be tried by a general court-martial.
October 15, 1993	LCol Mathieu was formally charged in relation to various incidents alleged to have occurred from January 27, 1993 to mid-March 1993 in Belet Huen, Somalia.

The accused raised a plea in bar of trial during the court-martial proceedings. One of the grounds raised by the accused in arguing that the court had no jurisdiction to try him on the torture and murder charges set out in the charge sheet signed by LCol Mathieu on June 18, 1993 and endorsed by MGen Vernon on July 21, 1993 related to the alleged lack of impartiality, real or perceived, on the parts of LCol Mathieu and MGen Vernon.[153] The defence argued that it was improper for LCol Mathieu to sign the charge sheet in his capacity as commanding officer while he, himself, was the subject of an investigation. It was improper, it was argued, because he was acting in a judicial or quasi-judicial capacity requiring impartiality.[154] Defence counsel stated:

> My understanding...of Lieutenant-Colonel Mathieu's involvement in this proceeding is as follows, and I stand to be corrected, but what I gather from reading the *Queen's Regulations and Orders* and discussions with other military personnel, is the following:...[H]e initiates the investigation; he receives the fruits of the investigation; he decides whether to lay any charges and what charges to lay; he directs that a synopsis of evidence be prepared; he delivers that synopsis to, or causes it to be delivered to the accused; he receives any statement in response from the accused; he decides whether to refer the matter to a higher authority, and, if so, adds his recommendation.[155]

According to the defence, the commanding officer could not act with impartiality in signing the charge sheet because of his own personal interest in the outcome of the investigation in respect of which he was a suspect. The defence argued that, as a result, the court had no jurisdiction to proceed with a trial of the charges against Pte Brown.[156] With respect to MGen Vernon, the defence argued that, while he was not himself biased in performing his function as the convening authority, there was a reasonable apprehension of bias.[157]

In response, the prosecution submitted that there was no evidence of real bias on the part of LCol Mathieu. With respect to perceived bias, the prosecution argued that the subject matter in respect of the investigation of LCol Mathieu was distinct from the circumstances of those involving Pte Brown and, therefore, could not lend itself to a perceived bias on his part. The prosecution also argued that there was not actual or perceived bias in the actions of MGen Vernon.[158]

The court allowed the defence plea in bar of trial as a matter of law.[159] The court terminated its proceedings and returned the matter to the convening authority, pursuant to *QR&O* article 112.24(7).[160] In so doing, the court held:

As a possible suspect in an investigation involving an alleged shooting of an individual, the court has no difficulty in concluding that Lieutenant-Colonel Mathieu had a personal interest in the outcome of that investigation. That personal interest continues until this day, as evidenced by Exhibit "VD-2" which indicated that LCol Mathieu has been charged in respect of matters alleged to have occurred between 27 January 1993 and mid-March 1993 in Somalia...[A]t the time of signing the charge sheet accusing Private Brown of second degree murder, Lieutenant-Colonel Mathieu had a personal [interest in the] outcome in an investigation relating to the alleged use of deadly force. The investigations may have been dealing with distinct incidents, but the commonality of location, timing, and subject matter of the alleged events cannot be ignored.[161]

In analyzing the role of a commanding officer in the laying of charges, the court held that "a commanding officer is exercising at least a quasi-judicial role when he is determining whether or not charges should be proceeded with against an accused service member" and that, as such, the commanding officer "must execute that duty with quiet and impartial objectivity".[162] The court applied the "real apprehension of bias test" to Pte Brown's case as follows.

[W]ould a reasonable, well-informed person consider that Lieutenant-Colonel Mathieu's interest in the outcome of the investigation in which he was a suspect might have had an influence on his exercising his duty in determining whether or not to proceed with the charges against Private Brown and sign[ing] the charge sheet. The test...involves issues of both actual and perceived bias....The question postulated...is to be answered from the point of view of the perception of the reasonable informed person.[163]

The court concluded that there was no evidence of actual bias on the part of LCol Mathieu when he signed the charge sheet. As well, there was no evidence of actual bias on the part of MGen Vernon when he endorsed the charge sheet.[164] The court concluded that:

Pte Brown's commanding officer who had an interest in the outcome of the investigation in which he was a suspect, Lieutenant-Colonel Mathieu would be perceived as being concerned about the approach his superiors would be taking to that investigation and its outcome, and his role, if any, in it. The perception could be or would be, that he would be concerned as to how the Code of Service Discipline would be applied to him, and if it were to be applied.... A commanding officer who is a suspect in a military investigation respecting his unit is not in this court's view, at least on the facts of this case...in a position to act quietly and with impartial objectivity on the disposition of charges concerning members of his unit which have been referred to him, particularly, when the subject matter of the charges

in the investigation of which the commanding officer is a suspect are so related by location, time, general subject matter, with the same unit, having the same mission. [T]here was, even on the limited facts of this case, a very real possibility of perceived bias on the part of Lieutenant-Colonel Mathieu when he signed the charge sheet...because no matter which course of action he took, it could reasonable be perceived to have been motivated by his own self-interest and not simply his executing his duty. Such a perception of bias cannot be countenanced especially so when the charges clearly involved in this case are so serious and put the accused in such grave jeopardy.[165]

The accused was subsequently recharged with second degree murder and torture with respect to the March 16, 1993 incident on a new charge sheet signed by a different commanding officer. Following trial by a general court-martial, the accused was found guilty of the included offence of manslaughter and was also found guilty of torture. He was sentenced to imprisonment for five years. Pte Brown appealed his conviction and sentence.[166] One of the grounds again raised by the appellant was with respect to the issue of the reasonable apprehension of bias on the part of the commanding officer signing the new charge sheet. This ground of appeal was based on the admitted fact that the commanding officer who signed the charge sheet and referred the matter to a higher authority, took legal advice from the officers in the Office of the Judge Advocate General who, then and later, were responsible for the prosecution of Pte Brown and some of the other persons charged in relation to the March 16, 1993 incident. The appellant again argued that the role of the commanding officer in signing the charge sheet was quasi-judicial in nature, thus requiring actual and perceived impartiality.[167] In relation to this issue, the Court-martial Appeal Court held:

[T]his submission is entirely without merit. It misapprehends the nature of the role of the commanding officer who signs a charge sheet and then refers the matter to higher authority. Contrary to the situation where the commanding officer decides himself to dispose of a matter summarily, there is nothing judicial or quasi-judicial in the commanding officer's decision here. His function, like that of the convening authority to whom he refers the case, is wholly administrative in nature and there is no requirement that he act judicially.[168]

This prosecution arising from events in Somalia provides an example of circumstances where the role of the commanding officer as prosecution authority can conflict with the commanding officer's personal interests. Obviously, this example is an extreme one. The commanding officer was actually under investigation at the time when the charge sheet was signed

against the accused. However, and notwithstanding the conclusion of the Court Martial Appeal Court on this issue in the appeal from conviction, there are other situations where a conflict may arise between the commanding officer's role as prosecuting authority and his or her personal interests. This is discussed further below.

AREAS OF CONCERN

The foregoing discussion of the Canadian military justice system and its comparison with the civilian system yields two broad areas of concern about the execution of the prosecution function in the military setting:

- the multiplicity of functions of the commanding officer and
- the lack of structure in prosecutorial discretion.

Before discussing these concerns in detail, there is a more general issue that must be addressed: The reason why the exercise of prosecutorial discretion in the military is a matter of serious public interest.

The Public Interest in Military Prosecutions

As mentioned, the primary function of the military justice system is to promote the good order and discipline of the Canadian Forces. At the same time, the ambit of that system is not confined solely to matters of military concern. Sometimes, serious criminal conduct is at issue. Accordingly, there is a public interest at stake in prosecuting such offences in the military context similar to the interest that exists in the civilian setting.

As was seen earlier, a great many factors are relevant to the decision whether to commence a prosecution in the civilian setting. Those factors help ensure that prosecutions are mounted only where it is likely that the prosecution would result in a conviction and, in addition, where the prosecution would serve the public interest. The factors addressed in the guidelines governing the decision to prosecute amount to a statement of the public policies at stake in the exercise of the prosecution function in relation to matters of public liability.

There is no reason for believing that these public interest factors evaporate in the military setting. There is an ongoing public interest in ensuring that the laws of general application are enforced against persons subject to the Code of Service Discipline and that they are enforced in a manner that respects the particular interests articulated, for example, in the federal *Crown Counsel*

Policy Manual. At the same time, the factors that are clearly *not* relevant in the civilian setting (e.g., political influences, prohibited grounds of discrimination, etc.) would appear to be equally inapplicable in the military setting.

To take an example in which the decision to prosecute has been the subject of considerable controversy in the civilian setting in recent years, consider the issue of spousal assault. If a complaint were made in the military setting that a person subject to the Code of Service Discipline was responsible for a spousal assault, presumably, the considerations that relate to the decision whether to prosecute that offence would be very similar, if not identical, in the military and civilian settings. The interests of the victim would have to be taken into account. The question whether to proceed against the accused over the objections of the victim would have to be addressed. In other words, society's interests in prosecuting such offences would be just as present in the military setting as in the civilian setting. The special guidelines that have been developed to govern the exercise of prosecutorial discretion in such matters would be relevant in both settings. The same could be said about the prosecution of many other kinds of offences — drug offences, hate propaganda crimes and offences against the person.

The main distinction of the military justice system, then, is not that the public interests involved in the decision to prosecute are not applicable. Rather, it is that the *additional* public interest in the good order and discipline of the Canadian Forces must receive due attention. When assessing the shortcomings of the execution of the prosecution authority within the military justice system, then, it is appropriate to compare that system with the civilian system since the same, or very similar, public interests present themselves in both settings. However, one must also be careful not to lose sight of the fact that there is an additional and significant factor that affects the exercise of prosecutorial discretion in the military setting — the good order and discipline of the Canadian Forces. Accordingly, in considering what, if any, reforms should be made to the military justice system, this factor must not be overlooked.

At the same time, it would be wrong to give undue emphasis to the military goals served by the military justice system. To do so would create a risk that justice will not be done. If military goals become superordinate, Canadians cannot have confidence that the public interest is being adequately served. Military discipline and *esprit de corps* may dictate that some persons be held more responsible for their misconduct than others, or not at all. They may require that certain behaviour be punished severely or met with a blind eye. These consequences may be acceptable in situations where the conduct amounts to a pure service offence, where military interests are clearly paramount. However, where serious criminal conduct is

alleged and the public interests that are generally at stake in a prosecution are present, it is important that the decision to prosecute be informed by considerations similar to those applicable in the civilian setting.

With these general observations in mind, the particular areas of concern arising from the exercise of the prosecution authority in the military setting are outlined.

Multiplicity of Functions of the Commanding Officer

As described earlier, there are three separate roles performed by commanding officers in the military justice system: policing functions, prosecutorial powers and judicial responsibilities. In addition to these functions, they have overall responsibility for the good order and discipline of the service members within their command.

In the civilian setting, policing, prosecutorial and judicial roles are clearly demarcated and performed by independent entities. This separation of functions is important to ensure that, in exercising the discretion within each area of responsibility, only relevant factors are taken into account.

The separation of policing from prosecutorial functions is well established in Canada. The federal *Crown Counsel Policy Manual* states:

> Maintaining the independence of the police from direct political control is fundamental to our system of law enforcement. Under the common law, the police could not be directed by the Executive or by Parliament to start an investigation, much less lay charges.[169]

At the same time, prosecutors have control of the matter once charges have been laid.

> Once charges are laid, full responsibility for the proceedings shifts to the Attorney General. On request, police have the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court. As well, the Attorney General has the authority to control the proceedings after charges are laid, including conditions of bail, staying or withdrawing charges and representations on sentence.[170]

In addition to the clear separation of policing and prosecutorial roles, the civilian judiciary is completely independent from both policing entities and prosecutorial authorities (indeed from the executive as a whole) and that independence is constitutionally protected.

There is some separation of roles in the military setting. Commanding officers may not, generally speaking, try summarily any offence in which

they were involved at the investigatory stage. The decision to convene a court-martial is not taken by the commanding officer but by a more senior officer (the convening authority). At the same time, there is a good deal of overlap between these roles. For example, the decision to charge a person with a service offence falls to the commanding officer even if that officer was involved in the investigation. The commanding officer can try a person summarily after having taken the decision to prosecute.

In the area that concerns us here, prosecutorial powers, this mixture of roles is problematic. It means the decision to prosecute can be affected by the perspective of the case acquired by the commanding officer during the investigation. This does not permit a detached assessment of the evidence relating to the charge, such as exists in the civilian setting. Similarly, in the case of a summary trial, the decision whether an offence has been proved beyond a reasonable doubt is taken by the commanding officer who had already concluded that an investigation into the matter justified a prosecution. Again, the perspective gained through involvement in one function may well affect the decision taken in exercising the other.

Layered on top of this mixture of roles is the commanding officer's responsibility for good order and discipline. As discussed earlier, this aspect of the commanding officer's responsibilities is clearly distinct from the situation of prosecutors in the civilian context. The concern that arises from this reality is that the discretion exercised by commanding officers as prosecutors will be affected, unconsciously or otherwise, by the fact that the existence of misconduct within the commanding officer's command may reflect on his or her ability to maintain good order and discipline. In short, commanding officers may be in a position of actual, or apparent conflict of interest in making the decision as to how to respond to misconduct by service members.

There is an additional, more serious concern that can arise from the current reliance on commanding officers to initiate prosecutions. At times, the conduct of the commanding officer may itself give rise to legal proceedings and, therefore, the officer will not be in a position objectively to evaluate or respond to the conduct of those in his or her command.

Commanding officers are not liable to a prosecution or civil suit in relation to their responsibilities under the Code of Service Discipline. Section 270 of the *National Defence Act* states:

> 270. No action or other proceeding lies against any officer or non-commissioned member in respect of anything done or omitted by the officer or non-commissioned member in the execution of his duty under the Code of Service Discipline, unless the officer or non-commissioned member acted, or omitted to act, maliciously and without reasonable and probable cause.

Thus, for example, a commanding officer could not be charged with negligent performance of duty for failure to invoke his or her powers under the *National Defence Act* or QR&Os to discipline service members under his or her command. However, the protection provided under section 270 would not appear to prevent disciplinary action against a commanding officer in a situation where lack of discipline within a unit was attributable to the negligence of the commanding officer. In other words, section 270 appears to protect the commanding officer in relation to the exercise of his or her specific disciplinary powers, but not for general negligence in maintaining discipline within the command. Accordingly, section 270 does not remove the potential for conflicts of interest in the exercise of discretion by commanding officers.

More serious legal implications can arise where service members within a commanding officer's responsibility engage in misconduct that is criminal in nature. The commanding officer could be liable as a party to that misconduct under general rules of secondary liability. A person who is in a position of responsibility in relation to others may be liable for aiding and abetting crimes against those persons if he or she fails to take steps for their protection.[171] This could arise, as in the *R.* v. *Nixon* case, in situations where a prisoner was mistreated.

The charges arising from events in Somalia described in the previous section provide an extreme example of the general concerns raised above. There, the commanding officer was actually under investigation at the point in time when he was exercising prosecutorial discretion in respect of persons within his command.

Lack of Structure in Prosecutorial Discretion

In the civilian system of criminal justice, there are institutional structures whose purpose is to ensure that discretion is exercised objectively and on relevant grounds. As has been mentioned, policing functions are set apart from prosecutorial responsibilities. Ministers responsible for civilian police departments do not have responsibility for prosecutions and vice versa. Even within the departments of attorneys general, further independence is achieved either through creation of the office of director of public prosecutions or by less formal means. And, of course, judicial independence is constitutionally entrenched.

Such arrangements foster independence in the exercise of discretion within each of these distinct functions. They help prevent extraneous influences from affecting the way in which the powers to investigate, prosecute and

judge crimes are employed. The Canadian military justice system lacks such institutional arrangements and, in fact, as discussed above, responsibility for policing, prosecutions and adjudication actually falls not to a single department, branch or sector of government but to a single individual — the commanding officer. The obvious concern that derives from this state of affairs is that decision making by commanding officers within each of their roles under the military justice system is susceptible to extraneous influences.

Such a concern could be alleviated if there were clear guidelines governing the exercise of discretion within each of the roles assigned to commanding officers. Guidelines could instruct commanding officers to take into account only such factors as are relevant to the decisions that must be taken within those roles. No such guidelines currently exist.

While guidelines could reduce, at least in theory, both the appearance of conflict and actual conflict in the various roles performed by commanding officers, it is unlikely that they could eradicate them. First of all, no guidelines, no matter how strict, could alter the reality that commanding officers execute multiple roles simultaneously. Second, the guidelines themselves would inevitably conflict. For example, the factors that a commanding officer might be instructed to take into account in deciding whether to commence an investigation (e.g., hearsay statements) could be completely extraneous in deciding whether to charge or prosecute the person. Commanding officers would be exhorted to consider and not to consider certain factors at the same time.

Thus, while the discretion that falls to commanding officers within the military justice system is unstructured, it is difficult to conclude that guidelines, in themselves, would be an adequate solution. They could alleviate the situation somewhat but, at the end of the day, the potential for actual and perceived conflict would persist.

Conclusion

In terms of the characteristics of the offices of those executing the prosecution authority in the military, it is clear that the commanding officer is in no position to execute independence of judgment in the exercise of the discretion whether to proceed on particular charges. This conclusion is inescapable when one considers the variety of roles the commanding officer must discharge in the events leading up to a trial within the military justice system. Again, given that the overriding consideration in the process is the good order and discipline of the military, the commanding officer is responsible to his or her superiors in relation to that consideration

and, as such, subject to "command influence" in relation to how disciplinary matters are handled within his or her sphere of responsibility.

If the sole function of the military justice system were to address matters relating to the efficiency, discipline and morale of the military, then this state of affairs would be uncontroversial. The commanding officer is obviously in a position to judge what effect certain forms of misconduct are likely to have on the smooth functioning and operational readiness of military units. Insofar as the military justice system addresses these concerns, the existing system is reasonably fit for its purpose. However, the fact that there are public interests far broader than this gives rise to a concern about the manner in which prosecutorial authority is exercised within the military.

CONCLUSIONS AND RECOMMENDATIONS

Guiding Principles

By the foregoing, it appears to us that there are reforms that should be made to the manner in which the prosecution authority is exercised within the military. As stated earlier, it was not within our mandate to question the very existence of the military justice system. The recommendations that are set out below are based on the assumption that a military justice system will continue to exist in Canada. The shortcomings we have seen in that system would not, in our view, justify its demise. We believe that with the reforms proposed here (and those in relation to military police cited earlier), the military justice system can be preserved.

Before describing the reforms we think are appropriate to make in relation to the prosecution function, it is important to set out two significant considerations that lie behind our proposals. These considerations were urged on us by persons knowledgeable about the current military justice system and who work within it. We agree with them.

First, it is important to respect the role of commanding officers in maintaining discipline within the Canadian Forces. The idea that disciplinary authority should be left with commanding officers lies at the core of our current military justice system. The reasoning goes that persons within the Canadian Forces look to commanding officers for decisions which may affect their lives or safety. Obeisance of orders issued by commanding officers is necessary to the success of military operations. If disciplinary powers were completely taken away from commanding officers, there may be a risk that respect for their authority would diminish correspondingly.

If so, there would be serious consequences. The good order of the Canadian Forces and, thus, their operational effectiveness could be adversely affected. Accordingly, we believe that the authority of commanding officers to maintain discipline should not be undermined unless the interests of justice require it.

At the same time, of course, interests of fairness must be balanced with disciplinary concerns. In fact, lack of fairness may itself affect discipline negatively.

> If the military justice system fails to accommodate the *Charter* to the greatest extent possible, there is a danger that military discipline would be undermined in the long-term by the perception that military justice is unjust. At some point the efficiency of the Forces and the recruitment of quality personnel will be eroded by the perception that members of the military are unfairly deprived of benefits enjoyed by civil society. Indeed, a certain amount of attrition among Forces personnel is already attributable to discontent with the differences between service and civilian life.[172]

Second, the military justice system should function well in both domestic and field contexts. We must not, for example, create a system that works one way in Canada and another way outside Canada. However the system is to function and whoever is to exercise authority and discretion within it, the same rules should apply across the Canadian Forces wherever they may be deployed. The concern is that if there were such a distinction, the operation of military justice in field situations would be impaired. Those with responsibilities within it, because of a lack of experience and the inherent complications of field operations, would be unprepared and poorly placed to discharge them.

With these principles in mind, we propose the following recommendations.

Recommendation Six

Offences falling under section 70 of the *National Defence Act* should be tried by civilian courts in all cases, subject only to a status of forces agreement or the existence of exigent circumstances requiring that the trial take place before a service tribunal.

Commentary. The reasoning underlying section 70 is that there are some matters that are so serious that they should never be prosecuted before service tribunals because the military connection with the offences is, by definition, subordinate to the general public interest in prosecuting them. This reasoning, in our view, applies both to offences in Canada and to

offences committed abroad by persons subject to the Code of Service Discipline. As such, we believe such offences should, where feasible, be prosecuted before civilian courts.

However, there may be circumstances where a trial cannot take place before a civilian court. For example, this may occur where the state in which the offence occurred (and, therefore, with primary jurisdiction over it) would not permit it. Where this is the case, the foreign state's position would be reflected in a status of forces agreement. As such, the general proposition that Canadian civilian courts should have jurisdiction over section 70 offences should be subject to a status of forces agreement that provides otherwise.

There may also be situations where it is logistically impossible to hold a trial in Canada. This may be the case, for example, where the witnesses are foreign nationals or the evidence cannot be moved from the foreign jurisdiction. Sometimes these obstacles can be overcome through the taking of depositions abroad or the use of substitute evidence (e.g., copies or photographs). However, where the obstacles are insuperable, service tribunals should have jurisdiction. We note that there would appear to be no reason why offences arising out of the incidents in Somalia could not have been tried in civilian courts in Canada.

Recommendation Seven

Commanding officers should retain disciplinary authority in relation to minor service offences. Designated offences, including serious service offences and offences falling under the Criminal Code or other acts of Parliament, should not be the responsibility of commanding officers.

Recommendation Eight

Commanding officers should be required to refer designated offences, including serious service offences and offences falling under the Criminal Code or other acts of Parliament, to military police for investigation. They should not have the power to order military police not to investigate an offence.

Commentary. As stated above, we believe the disciplinary role of commanding officers should be respected. At the same time, we think the current role of commanding officers is unduly broad and we make recommendations below to narrow it. In particular, serious offences should be

investigated and prosecuted by authorities who are in a position to exercise discretion independent from the chain of command. However, there is no need, in our view, to withdraw all authority over military discipline from commanding officers. As discussed above, commanding officers are often best placed to decide how to respond to misconduct within their command. Their knowledge of the unit in which the misconduct arose, their experience as soldiers, their acquaintance with the individuals involved and their concern for the efficiency and functioning of the Canadian Forces suggest that commanding officers should continue to play a major role in military discipline.

In our view, commanding officers should continue to have authority over a range of misconduct that may be described as purely disciplinary. They should not, however, act as the prosecuting authority for serious service offences or crimes. This means that they would continue to have power to prosecute and dispose summarily of an array of offences of a relatively minor nature. We agree generally with the following statement.

> Minor offences of a military nature must remain within the jurisdiction of the Commanding Officer. He or she is responsible for the troops under his or her command. However, as the summary trial infringes the Charter, the Commanding Officer's powers of punishment must be limited in order to exclude them from the scope of section 11(d). If the powers of punishment were limited to disciplinary powers only, then the Commanding Officer could be said to be exercising jurisdiction over disciplinary matters rather than criminal offences. As section 11(d) only applies to persons charged with an "offence", the section would not apply to disciplinary matters. Therefore, the Commanding Officer should not be able to sentence an offender to a period of detention; sentences of this nature should be imposed by court martial only. the Commanding Officer would still be able to pass sentences such as limited fines, confinement to barracks, extra work and drill, reprimands, and other punishments that are clearly disciplinary rather than criminal in nature.[173]

We express no conclusion about the compliance of summary proceedings with the Charter. It may well be that reforms to that form of procedure are required, as has been suggested by some authors.[174] We simply suggest that commanding officers should retain disciplinary authority over a range of minor matters in order to preserve their important role in maintaining discipline within the Canadian Forces. In addition, we believe that in relation to more serious matters, commanding officers should continue to have the power to request an investigation by an independent police service. This would complement the role of commanding officers in relation to disciplinary matters and help ensure that serious

matters are brought to the attention of the military police. However, in order to preserve the independence of the military police, commanding officers should not have the power to order the military police to desist from investigating matters within their jurisdiction.

Recommendation Nine

Prosecution functions should be discharged by an independent military prosecution authority. This authority should have responsibility for pre-screening charges in respect of serious matters.

Recommendation Ten

Guidelines should be developed to guide the exercise of prosecutorial discretion by the military prosecution authority. Those guidelines should apply to the process of pre-charge screening and to the exercise of prosecutorial discretion before and during trial. The guidelines should emphasize the independence of the legal officers, include a requirement of sufficiency of evidence and address the factors that are relevant, and those that are not relevant, to the decision to prosecute. A starting point for such guidelines should be the federal *Crown Counsel Policy Manual.*

Commentary. The decision to lay a charge for a serious matter should no longer rest with commanding officers. As outlined above, commanding officers are not well placed to make that decision because of the multiple roles they must execute and their susceptibility to extraneous influences. In addition, they lack the necessary training and experience to be able to ascertain the legal significance of misconduct that comes to their attention. Who, then, should make this decision? In the civilian setting, the charging decision is usually left to police. However, in some jurisdictions, police lay charges only after they have received the approval of a prosecutor. The appropriate charging process in the military setting must be determined.

There are actually two steps in the exercise of prosecutorial discretion in relation to the decision to prosecute. The first is the decision to charge. The second is the decision to pursue the charge through pre-trial and trial proceedings. At present, commanding officers have authority over both steps. In a reformed military justice system with an independent military police force, the decision whether to charge a person with an offence could be left with police authorities, as is generally the case in the civilian

setting. However, there would be a remaining issue whether the charge should be prosecuted. In the civilian setting, this second decision is left to the prosecution authority — the attorney general or DPP — although, in practice, many decisions are left with local prosecutors. The question, then, is who should exercise discretion in relation to the decision to prosecute offences within the military justice system?

A logical place to turn would be to the Office of the Judge Advocate General (JAG). At present, legal officers from this office have actual carriage of the prosecution case before courts-martial so it is natural to consider investing the JAG with full prosecutorial responsibilities. First, however, some description of the role and organization of the office of the Judge Advocate General is necessary.

The current Judge Advocate General has described the role and function of his office as follows.

> Military lawyers and judges of both the regular and reserve component of the Canadian Forces play an active role in the military justice system. At the summary trial level it is the unit officers who play the predominant role, however they are directly advised by legal officers and a legal officer reviews all results of summary trials. Although the pre court martial decision making process is controlled by commanding officers and superior commanders, they too are assisted and advised at each stage by legal officers. At courts martial legal officers act as prosecutors and, if the accused wishes as defending officers. Military judges, who are appointed for a fixed term by the Minister of National Defence, are experienced legal officers who have successfully completed both a Canadian Forces judges course and the provincial judges course.[175]

> The office of the Judge Advocate General provides a full range of legal services to the Department of National Defence and the Canadian forces. This includes in addition to duties relating to military justice such as prosecutions, defence work and appeals before both the Court Martial Appeal Court and the Supreme Court of Canada, such areas as claims against the Crown, human rights tribunals, international law, operational law and contracts.[176]

The Judge Advocate General is appointed by the Governor in Council under section 9 of the *National Defence Act,* and has four primary functions:

(i) to superintend, as Judge Advocate General, an independent statutory position, the Canadian Forces system of courts and military justice;
(ii) to act as Senior Legal Adviser to the Canadian Forces;
(iii) to act as Senior Legal Adviser to the Department of National Defence;
(iv) to manage and direct the Legal Branch.[177]

Among the JAG's responsibilities in relation to military justice are the obligation to provide legal advice to those within the military justice system, to administer that system, to supply prosecutors and defence counsel for purposes of courts martial and to appoint judge advocates (or recommend to the Minister of National Defence persons to be appointed president or presiding judge) for courts-martial.

These various responsibilities put the JAG into situations of potential conflict. To take an example, the JAG, in the role of legal advisor to the Department of National Defence and the Canadian Forces, attends daily executive meetings presided over by the Deputy Minister of National Defence (DM) and the Chief of the Defence Staff (CDS). At such meetings, briefings on operational situations or other matters of pressing interest are given and related issues are discussed. While they normally last 15 or 20 minutes, during events in Somalia, daily executive meetings lasted as long as 90 minutes.[178]

This means that the JAG is involved in discussions on operational matters as they unfold and offers legal opinions on them. Simultaneously, the JAG has responsibility for the operation of the military justice system in respect of any of those matters should there be disciplinary repercussions arising from them. For example, a JAG officer (the chief military trial judge) appoints the prosecutor and the judge advocate for a court-martial. The JAG may appoint the defence counsel, while having the overall responsibility for the functioning of military tribunals. The JAG, as the person responsible for military justice, may have taken a legal position on the liability of a person charged with a service offence in the form of legal opinions given in his or her capacity as legal advisor to the Department and to the Canadian Forces before the military justice system, for which he or she is responsible, is engaged.

The confluence of these various roles is a greater concern than it is in the civilian setting. Admittedly, attorneys general must also discharge a variety of roles, including acting as legal advisor to the government and overseeing the administration of justice.[179] Potential conflicts lie in the overlapping of these roles as well. Yet these potential conflicts are more tolerable in the realm of the civilian prosecutorial authority than in the military setting. As presented above, there are mechanisms in place that help ensure that in the exercise of prosecutorial discretion in the civilian setting only relevant considerations are taken into account. There is a delegation of prosecutorial discretion from the attorney general to directors of public prosecution in some jurisdictions and, generally, a great deal of autonomy in the decision making of local prosecutors. There is a long

tradition of attorney general (and, therefore, prosecutorial) independence which fortifies officials against extraneous influences. Many jurisdictions have articulated and published guidelines that direct the exercise of prosecutorial discretion and specifically prohibit consideration of irrelevant factors. Attorneys general and other prosecutorial authorities are publicly accountable for their decisions with reference to those guidelines.

If full prosecutorial responsibilities were given to the JAG, there would be no linkage to, or replacement for, the kinds of mechanisms that exist in the civilian setting to ensure appropriate and independent prosecutorial decision making. In our view, the multiplicity of functions assigned to the JAG results in the Office, as it is currently constituted, being no better placed than commanding officers in making the decision whether to prosecute on an independent footing. The combination of roles played by the Judge Advocate General creates a risk of both political and command influences (given the close relationship between the JAG, the DM and the CDS) if the JAG were invested with prosecutorial discretion. The lack of independence of the JAG and the close relationship between that office and both the command and executive was commented on in *R.* v. *Ingebrigtson*[180] and *R.* v. *Généreux*.[181]

As with commanding officers, the situation could be improved somewhat by the creation of guidelines on the exercise of discretion. However, guidelines would not be enough on their own to create independence where there exists a structural impediment to independence. Here that structural impediment is created by the current array of functions assigned to the JAG.

Still, there is a possibility of reforming the Office of the Judge Advocate General to create an appropriate office for the discharge of prosecutorial responsibilities. Before considering this possibility, some discussion of the structure of comparable offices in the United Kingdom and Australia would be instructive.

United Kingdom. There are several striking differences between the Office of the Judge Advocate General in Canada and its counterpart in the United Kingdom. First, the U.K. JAG is purely civilian in nature. The JAG is appointed by letters patent and is answerable to the Queen by way of the Lord Chancellor. Second, the JAG is not responsible for prosecutions before courts-martial. This is the responsibility of legal branches of the army and air force. The convening authority is responsible for the choice of charges. Third, while the U.K. JAG is responsible for the assignment of judge advocates to courts-martial, judge advocates are actually appointed by the Lord Chancellor, not the JAG.

The result of this arrangement is that the functions of the U.K. JAG are primarily related to the judicial sphere of the military justice system. The JAG's principal responsibilities are analogous to those of a chief justice. As described in a publication of the U.K. JAG, this sets the office apart from JAGs in other jurisdictions.

> In most of the Commonwealth Countries and other common law jurisdictions the Judge Advocate General is a serving commissioned officer. It is considered by tradition and by principle that in the United Kingdom the Judge Advocate General should be entirely separate from the Forces that it is his duty to serve. He and his judicial officers have an important role in the administration of criminal justice in the Army and the Royal Air Force. They are independent of the Forces, and as such it is their joint responsibility in giving legal advice to strike a fair and judicial balance between the need on the one hand properly to enforce a code of discipline within the Services that is effective and also acceptable to society as a whole, and on the other to uphold and maintain the legal rights of those who are alleged to have fallen foul of that code.[182]

It should be mentioned that the U.K. JAG has an advisory role in relation to the Ministry of Defence.

There is an aspect of the U.K. system that has given rise to concerns about independence and impartiality. In the *Findlay* case before the European Commission on Human Rights, the Commission expressed disfavour with the role of the convening authority in the U.K. military justice system. As mentioned, the convening authority decides the nature of the charges against the accused. The convening authority also decides the form of the court-martial to be established. In *Findlay*, the applicant argued that a court-martial was not independent of the prosecuting authority (i.e., the convening authority) because the members of the court-martial were serving members of the army and were under the command of the convening authority. In addition, it was argued that the lack of independence was not corrected by the presence of a judge advocate appointed by the Judge Advocate General since the JAG is closely linked to the Ministry of Defence as its principal legal advisor. In the result, the Commission concluded:

> Accordingly, the Commission considers that the applicant's fears that the court-martial lacked independence from the prosecuting authority in the case could be regarded as objectively justified particularly in view of the nature and extent of the Convening Officer's roles, the composition of the court-martial and its ad hoc convening. The Commission therefore finds that the court-martial did not constitute an independent tribunal, or consequently an impartial tribunal, within the meaning of Article 6 para. 1 of the Convention.[183]

The full argument in *Findlay* would not apply in Canada as the convening authority in the Canadian military justice system no longer appoints the members of a court-martial. Still, part of the reasoning in the case is applicable to the extent that the role of the judge advocate was not seen to be a guarantor of the independence of the service tribunal because of the link between the JAG and the Ministry of Defence. *A fortiori*, in the Canadian setting, in which the JAG has even closer ties to the Department of National Defence and has responsibility for both the prosecution and defence roles before courts-martial, the role of the judge advocate could not be seen as contributing to the independence of service tribunals.

In light of *Findlay*, reform of the process of prosecuting service offences has been contemplated in United Kingdom. One of the proposals under consideration is the creation of a military prosecution authority. Proposed amendments to the *Army Act*, 1955, would create a prosecution authority appointed by Her Majesty. The authority would have the power to amend, substitute, withdraw or discontinue charges and have carriage of cases before courts-martial.[184] The current U.K. JAG has described the purpose of these proposals.

> The proposed policy is that the role of the convening officer should be drastically altered by greatly reducing it. His only function in the trial would, henceforth, be to decide whether a particular serviceman should be prosecuted by court-martial. He would have the benefit of legal advice in reaching that conclusion, but, having done so, he would hand the case over to a newly created prosecuting authority. The prosecuting authority would be drawn from the ranks of the Army and Royal Air Force Legal Services respectively, but would be entirely independent from the chain of command. It would be responsible for settling charges and for withdrawing or adding new ones, and, indeed for deciding whether to support the convening officer's original decision to prosecute in light of all the available evidence. On that matter it would assume the responsibility for taking an independent decision. The prosecuting authority would also be solely responsible for the conduct of the case at trial, and the convening authority would no longer have any part to play in any of the court's decisions.[185]

Thus, the new prosecution authority would have full prosecutorial discretion and independence in the exercise of that discretion, including in relation to the decision to prosecute.

Australia. The Australian JAG is appointed by the Governor General. Unlike JAGs in other jurisdictions, the Australian Judge Advocate General must be a judge of the federal court or state supreme court to be

eligible for appointment.[186] As in the United Kingdom the Australian JAG's functions are mainly judicial in nature. However, in Australia the JAG generally refrains from providing legal advice to the forces.[187] Legal advisory services and the conduct of proceedings before courts-martial are the responsibility of Defence Force Legal Services.

Interestingly, in line with the reforms proposed in the United Kingdom, the Australian JAG has recommended creation of a director of military prosecutions for Australia.

> I believe there would be an advantage in establishing a legal officer of the Colonel (or equivalent) level as a Director of Military Prosecutions. The office would encourage consistency of approach and more professional supervision of the prosecution process before Defence Force Magistrates and Courts-Martial (and, perhaps, in more serious charges at the summary level).[188]

In addition to the benefits referred to, a director of military prosecutions would, if the office were structured properly, create an independent prosecutorial authority within the military justice system.

Reform Possibilities. There are two possibilities for reform of the Canadian JAG office arising from the U.K. and Australian situations. First, a legal services division responsible for prosecutions (i.e., carriage of cases before courts-martial) and separate from the JAG could be created, as currently exists in both the United Kingdom and Australia. This service could be given responsibility for prosecuting serious service offences. Reform along these lines would separate prosecutorial responsibilities from other legal services such as advisory, defence and judicial aspects of the military justice system which currently all fall under the authority of the Judge Advocate General. Second, to replace the prosecutorial discretion that currently falls to commanding officers to discharge, the prosecution service could be given discretion over prosecution functions and independence in the exercise of that discretion as has been proposed in both the United Kingdom and Australia. The effect of this latter approach would be to create an office of director of military prosecutions, as suggested by the Australian JAG. This office could be structured along the lines of a DPP with the attributes of independence typical of such a position (statutory appointment, security of tenure, etc.).

Reform along these lines is, in our view, necessary in the Canadian military context. First, it would sever legal advisory services from the prosecution function. Second, it would ensure independence in the exercise of

prosecutorial authority from both the chain of command and from the risk of political influence. As such, reforms along these lines would create an office with singular responsibility for prosecutions.

Further, we believe that one of the functions of the new prosecution authority should be to oversee a pre-charge screening process. This would mean that no charges in relation to serious matters would be presented without approval of the prosecution authority. Some civilian jurisdictions in Canada (Quebec, New Brunswick and British Columbia) employ such a process. The Law Reform Commission of Canada recommended creation of a pre-charge screening process at the federal level.

19. Before laying a charge before a justice of the peace, the police officer shall obtain the advice of the public prosecutor concerning the facial and substantive validity of the charge document, and concerning the appropriateness of laying charges. Legislation setting out the duties of the public prosecutor should be amended, if required, to state this duty explicitly.

20. When seeking the advice of the public prosecutor, the police officer shall advise the prosecutor of all the evidence in support of the charge and all the circumstances of the offence, and the prosecutor shall where appropriate advise the police officer either that the evidence is not sufficient to support a conviction for the charge, or that a different charge or no charge would be more appropriate in all the circumstances.

21. Where it is impracticable to have the charge examined by the public prosecutor, or if the public prosecutor advises against proceeding with the charge, the peace officer nevertheless may lay the charge before a justice of the peace. In such cases, the peace officer must provide reasons to the justice of the peace explaining why it was impracticable to have the charge examined, or if applicable, must disclose that the public prosecutor has advised against the laying of the charge.

There are advantages of such a system, according to the Commission.

The major advantage to the system in New Brunswick, Quebec and British Columbia, where a Crown prosecutor must approve any charge in advance, is the increased assurance that criminal charges will only be laid where such action is appropriate. Our consultants from these provinces argue that the decision to lay a criminal charge is distinct from the investigation of crime. It is a decision that involves a judgement whether sufficient evidence exists to support a conviction. This decision, they argue, is one most appropriately made by the person trained in this area, the Crown prosecutor. Not every case in which there are reasonable and probable grounds to charge is one that can be successfully prosecuted. It is in the interest both of the individual and of the state to avoid the restrictions on liberty and

waste of state resources involved in an unjustified prosecution. In the same vein, a further advantage to such a system is the ability to detect technical errors in the form of charges in advance. When this screening occurs before charges are laid, the time of all parties and the court need not be taken up with objections, amendments or re-laying of charges.[189]

On the other hand, there is a strong tradition in the civilian system, even reflected in the Law Reform Commission's recommendations, of police independence in the charging function. Under the Commission's proposals, the police would have the final decision whether a charge should be laid, although they would have an obligation to explain why the Crown's approval had not been obtained.

According to the Martin Committee, this tradition of police independence means that prosecutors should screen charges only after the police have made a decision to lay the charge. Indeed, the tradition of police discretion over charges may be constitutionally protected.[190] The Committee considered the administrative advantages of pre-charge screening to be minimal. Further, it believed that police were in a better position to respond to the needs of a community than were prosecutors. Accordingly, the Martin Committee recommended a system of post-charge screening for Ontario, with consultation between police and prosecutors at the pre-charge stage.

Charge Screening in Ontario

22. The Committee recognizes the long standing tradition in Ontario of police consultation with the Crown in matters of difficulty at the pre-charge stage of the investigation. The Committee encourages this tradition of co-operative consultation to continue where, in the judgment of senior police officers, consultation is warranted. Where warranted, such consultation need not be limited to matters of evidence, but should also pertain to the various public interest factors that may affect the course of the prosecution apart altogether from the evidence....

The Mechanics of Post-Charge Screening

24. The Committee recommends that the investigators should provide to Crown counsel for the purposes of screening charges, all information necessary to ascertain if the threshold test for conducting a prosecution has been met, and all information necessary to assess the impact of any relevant public interest factors in the prosecution. This material will necessarily include, but will not be limited to, that which is required for disclosure.[191]

The question is, which system is appropriate in the military context? For three reasons, we believe a system of pre-charge screening by an independent prosecution authority is appropriate in the military setting.

1. There is no tradition of police independence in the military setting. As such, the main argument against pre-charge screening put forward by the Martin Committee has no application in the military setting. Certainly, there is no reason to think that pre-charge screening in the military setting would raise constitutional issues.

2. There is no reason to believe that military police would be in a better position than the prosecution authority to assess the needs of the military community.

3. The administrative advantages of pre-charge screening are likely to be greater in the military setting than in the civilian setting. Military police have no existing role in the charging process and, therefore, no experience in drafting charges. Given the quality control advantages in a system of pre-charge screening, such a system would be preferable to leaving the charging process to military police. Prosecutors would have the legal training necessary to determine whether charges were well founded.

Finally, in addition to the creation of an independent prosecution authority for the Canadian military, we believe that guidelines should be articulated for the exercise of prosecutorial discretion (and, therefore, in relation to pre-charge screening) by that authority. Such guidelines would ensure that prosecutions are mounted on a proper evidentiary footing, that the public interest, including the public interest in a well-disciplined and effective military, is respected and would underscore independence of the prosecution authority itself. A starting point for such guidelines would be the existing federal *Crown Counsel Policy Manual.*

CHAPTER FOUR

Summary of Recommendations

THE ROLE OF THE MILITARY POLICE

Recommendation One

The functions and legal basis of military policing should be set out in the *National Defence Act* or in the Queen's Regulations and Orders.

Recommendation Two

The administrative orders concerning the organization, duties and procedures of military policing should be consolidated into a single source or as few sources as are necessary.

Recommendation Three

Commanding officers should be required to report and refer certain matters or types of incidents to military police for investigation, with appropriate allowance for the exigencies of field operations, and these designated matters should include criminal offences, serious service offences and any matter that has implications with respect to security.

Recommendation Four

Independence in military policing should be strengthened not only by requiring designated matters to be investigated by military police but by limiting the discretion of the commanding officer on completion of the investigation.

Recommendation Five

Contingents of Canadian Forces deployed in field operations should be accompanied by military police in numbers proportionate to the size of the deployed force and the nature of its mission, and clear directives should be given to field commanders that certain types of incident or misconduct must be referred to the military police as soon as practicable for investigation and disposition.

PROSECUTORIAL DISCRETION IN THE MILITARY SETTING

Recommendation Six

Offences falling under section 70 of the *National Defence Act* should be tried by civilian courts in all cases, subject only to a status of forces agreement or the existence of exigent circumstances requiring that the trial take place before a service tribunal.

Recommendation Seven

Commanding officers should retain disciplinary authority in relation to minor service offences. Designated offences, including serious service offences and offences falling under the Criminal Code or other acts of Parliament, should not be the responsibility of commanding officers.

Recommendation Eight

Commanding officers should be required to refer designated offences, including serious service offences and offences falling under the Criminal Code or other acts of Parliament, to military police for investigation. They should not have the power to order military police not to investigate an offence.

Recommendation Nine

Prosecution functions should be discharged by an independent military prosecution authority. This authority should have responsibility for prescreening charges in respect of serious matters.

Recommendation Ten

Guidelines should be developed to guide the exercise of prosecutorial discretion by the military prosecution authority. Those guidelines should apply to the process of pre-charge screening and to the exercise of prosecutorial discretion before and during trial. The guidelines should emphasize the independence of the legal officers, include a requirement of sufficiency of evidence and address the factors that are relevant, and those that are not relevant, to the decision to prosecute. A starting point for such guidelines should be the federal *Crown Counsel Policy Manual.*

APPENDIX

Guidelines and Standards Relating to Prosecutions

REPORT OF THE ROYAL COMMISSION ON THE DONALD MARSHALL, JR. PROSECUTION, VOLUME 1: FINDINGS AND RECOMMENDATIONS[1]

Recommendation 38
We recommend that:

(a) the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;
(b) the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:
    (i) the triviality of the alleged offence or that it is of a "technical" nature only;
    (ii) the age, physical health, mental health or special infirmity of an alleged offender or witness;
    (iii) the staleness of the alleged offence;
    (iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);
    (v) the likely effect of a prosecution on public order and morale;
    (vi) the obsolescence or obscurity of the law;
    (vii) whether the prosecution would be perceived as counterproductive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);
    (viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;
    (ix) the prevalence of the alleged offence and any related need for deterrence;
    (x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;
    (xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;

(xii) the attitude of the victim of the alleged offence to a prosecution;
(xiii) the likely length and expense of a trial;
(xiv) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;
(xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;
(xvi) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice;

(c) the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:
(i) the alleged offender's race, religion, sex, national origin, political associations, or beliefs;
(ii) the prosecutor's personal feelings concerning the victim or the alleged offender;
(iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or
(iv) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision;

(d) where the prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question;

(e) the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.

REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CHARGE SCREENING, DISCLOSURE AND RESOLUTION DISCUSSIONS[2]

Threshold Test for Commencing or Continuing a Prosecution

1. The Committee recommends that for the purposes of a threshold test regarding the screening of charges by the prosecutor, the test of a "reasonable prospect of conviction" be adopted for all offences.

2. The review to determine whether the threshold test has been met should include an assessment of the probative value of the evidence, including some assessment of the credibility of witnesses.

3. The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.

4. The review to determine whether the threshold test has been met should include a consideration of any defences, for example alibi, that should reasonably be known, or that have come to the attention of the Crown.

5. The same threshold test applies for commencing, continuing, or discontinuing a prosecution.

The Threshold Test and the Public Interest

6. The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.

Various Public Interest Factors that May be Relevant

7. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident.

8. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should *not* consider any political consequences for the government flowing from the prosecution.

9. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the circumstances and attitude of the victim. The attitude of the victim is not, however, decisive.

10. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.

11. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should *not* consider the status in life of either the accused or the victim.

12. The Committee therefore recommends that, in determining whether a prosecution is in the public interest, the Agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.

13. The Committee recommends that the agent of the Attorney General should take into account national security and international relations in determining whether a prosecution is in the public interest.

14. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the availability and efficacy of alternatives to prosecution.

15. The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General.

16. The Committee recommends that guidelines regarding the threshold test and what factors are included in the term "public interest" should be published by the Attorney General.

17. The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18. The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19. Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.

DEPARTMENT OF JUSTICE (CANADA), *CROWN COUNSEL POLICY MANUAL*[3]

The Decision to Prosecute

Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system....

Counsel must consider two main issues when deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued?

Sufficiency of the Evidence

In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable prospect of conviction.* This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law....

Crown counsel are expected to apply this evidential standard throughout the proceedings — from the time the investigative report is first received until the time of trial. When charges are laid, the test may have to be applied primarily against the investigative report, although it is certainly preferable – especially in borderline cases — to look beyond the statements of the witnesses. Later in the proceedings, especially after a preliminary inquiry, counsel may be able to make a more effective assessment of some of the issues, such as the credibility of witnesses. Assessments of the strength of the case may be difficult to make, and of course there can never be an assurance that a prosecution will succeed. Nonetheless, counsel are expected to review the decision to prosecute in light of emerging developments affecting the quality of the evidence and the public interest, and to be satisfied at each stage, on the basis of the available material, that there continues to be a reasonable prospect of conviction.

The Public Interest Criteria

Where the alleged offence is not so serious as plainly to require criminal proceedings Crown counsel should always consider whether the public interest requires a prosecution. Public interest factors which may arise on the facts of a particular case include:

(a) the seriousness or triviality of the alleged offence;
(b) significant mitigating or aggravating circumstances;
(c) the age, intelligence, physical or mental health or infirmity of the accused;
(d) the accused's background;
(e) the degree of staleness of the alleged offence;
(f) the accused's alleged degree of responsibility for the offence;
(g) the prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
(h) whether prosecuting would be perceived as counter- productive, for example, by bringing the administration of justice into disrepute;
(i) the availability and appropriateness of alternatives to prosecution;
(j) the prevalence of the alleged offence in the community and the need for general and specific deterrence;
(k) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
(l) whether the alleged offence is of considerable public concern;
(m) the entitlement of any person or body to criminal compensation, reparation or forfeiture if prosecution occurs;
(n) the attitude of the victim of the alleged offence to a prosecution;
(o) the likely length and expense of a trial, and the resources available to conduct the proceedings;

(p) whether the accused agrees to co-operate in the investigation or prosecution of others, or the extent to which the accused has already done so;
(q) the likely sentence in the event of a conviction; and
(r) whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, national security or that should not be disclosed in the public interest.

The application and weight to be given to these and other relevant factors will depend on the circumstances of each case.

The proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Mitigating factors present in a particular case can then be taken into account by the court in the event of a conviction.

Irrelevant Criteria
A decision whether to prosecute must clearly *not* be influenced by any of the following:

(a) the race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
(b) Crown counsel's personal feelings about the accused or the victim;
(c) possible political advantage or disadvantage to the government or any political group or party; or
(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

There are special guidelines that apply to offences that arise from apparent spousal assaults:

Spousal Assault Prosecutions
(a) Responsibility of Peace Officers
    (i) Investigation and Arrest
    All complaints of domestic violence involving spousal assault should be investigated immediately and thoroughly, with the intention of charges being laid for court prosecution, irrespective of whether the assaulted spouse wishes to proceed with charges. An early objective of the investigation should be the protection of and assistance to victims....

(ii) Swearing of Charges

Where an investigation supports the conclusion that a spousal assault has been committed, charges should be laid by the investigating officer, the victim served with a subpoena for the earliest possible trial date, a complete brief supplied to the Crown Attorney and the case set to the earliest convenient court docket for appearance. This directive should be considered mandatory and completed irrespective of the wishes of the victim.

UNITED KINGDOM, CROWN PROSECUTION SERVICE, *CODE FOR CROWN PROSECUTORS*[4]

2. General Principles

2.1 Each case is unique and must be considered on its own, but there are general principles that apply in all cases.

2.2 The duty of the Crown Prosecution Service is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court.

2.3 Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must also not be affected by improper or undue pressure from any source.

3. Review

3.1 Proceedings are usually started by police. Sometimes they may consult the Crown Prosecution Service before charging a defendant. Each case that the police send to the Crown Prosecution Service is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in this Code. Crown Prosecutors may decide to continue with the original charges, to change the charges or sometimes to drop the proceedings.

3.2 Review, however, is a continuing process so that Crown Prosecutors can take into account any change in circumstances. Wherever possible, they talk to the police first if they are thinking about changing the charges or stopping the proceedings. This gives the police the chance to provide more information that may affect the decision. The Crown Prosecution Service and the police work closely together to reach the right decision, but the final responsibility for the decision rests with the Crown Prosecution Service.

5. The Evidential Test

5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.

5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

Can the evidence be used in court?...

Is the evidence reliable?...

5.4 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

6. The Public Interest Test

6.1 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution". [*House of Commons Debates*, Vol. 483, col. 681, January 29, 1951.]

6.2 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.

6.3 Crown Prosecutors must balance factors for against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

Some common public interest factors in favour of prosecution

6.4 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

a. a conviction is more likely to result in a significant sentence;
b. a weapon was used or violence was threatened during the commission of the offence;
c. the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
d. the defendant was in a position of authority or trust;
e. the evidence shows that the defendant was a ringleader or an organiser of the offence;
f. there is evidence that the offence was premeditated;
g. there is evidence that the offence was carried out by a group;
h. the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack damage or disturbance;
i. the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference;
j. there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
k. the defendant's previous convictions or cautions are relevant to the present offence;
l. the defendant is alleged to have committed the offence whilst under an order of the court;
m. there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
n. the offence, although not serious in itself, is widespread in the area where it was committed.

Some common public interest factors against prosecution

6.5 A prosecution is less likely to be needed if:

a. the court is likely to impose a very small or nominal penalty;
b. the offence was committed as result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);

c. the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;
d. there has been a long delay between the offence taking place and the date of the trial, unless:
   - the offence is serious;
   - the delay has been caused in part by the defendant;
   - the offence has only recently come to light; or
   - the complexity of the defence has meant that there has been a long investigation;
e. a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
f. the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;
g. the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or
h. details may be made public that could harm sources of information, international relations or national security.

6.6 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment....

7. Charges

7.1 Crown Prosecutors should select charges which:
a. reflect the seriousness of the offending;
b give the court adequate sentencing powers; and
c. enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always continue with the most serious charge where there is a choice. Further, Crown Prosecutors should not continue with more charges than are necessary.

7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

7.3 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

AUSTRALIA, COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS, *PROSECUTION POLICY OF THE COMMONWEALTH*[5]

2. The decision to prosecute

Criteria governing the decision to prosecute

2.1 Sir Hartley Shawcross QC, then Attorney General, stated to the House of Commons on 29 January 1951:

It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the sub of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should prosecute "whenever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration." [*House of Commons Debates*, Vol. 483, col. 681, January 29, 1951.]

This statement is equally applicable to the position in Australia. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

2.2 The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

2.3 It follows that the objectives previously stated — especially fairness and consistency — are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

2.4 The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender.

2.5 When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. *A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.* In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions. This test will not be satisfied if it is considered to be clearly more likely than not that an acquittal will result.

2.6 The decision whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.

2.7 When evaluating the evidence regard should be had to the following matters:

(a) Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confession evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution.

(b) If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability having regard to the age intelligence and apparent understanding of the defendant?

(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?

(d) Has a witness a motive for telling less than the whole truth?

(e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?

(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?

(g) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?

(h) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?

(i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?

(j) Where child witnesses are involved, are they likely to be able to give sworn evidence?

(k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the defendant?

(l) Where two or more defendants are charged together, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each defendant should separate trials be ordered?

This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must be prepared to look beneath the surface of the statements.

2.8 Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.

2.9 The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.

2.10 Factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;
(b) any mitigating or aggravating circumstances;
(c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim;
(d) the alleged offender's antecedents and background;
(e) the staleness of the alleged offence;
(f) the degree of culpability of the alleged offender in connection with the offence;
(g) the effect on public order and morale;
(h) the obsolescence or obscurity of the law;
(i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
(j) the availability and efficacy of any alternatives to prosecution;
(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
(m) whether the alleged offence is of considerable public concern;
(n) any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
(o) the attitude of the victim of the alleged offence to a prosecution;
(p) the likely length and expense of a trial;

(q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
(s) whether the alleged offence is triable only on indictment; and
(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

2.11 As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the court at sentence in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued....

2.13 A decision whether or not to prosecute must clearly not be influenced by:
(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
(b) personal feelings concerning the alleged offender or the victim;
(c) possible political advantage or disadvantage to the Government or any political group or party; or
(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution....

Choice of Charges

2.18 In many cases the evidence will disclose an offence against several laws. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence.

2.19 In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge, and the considerations set out later in this Statement under Mode of Trial, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

2.20 Under no circumstances should charges be laid with the intention of providing scope for subsequent charge-bargaining.

UNITED NATIONS GUIDELINES ON THE ROLE OF PROSECUTORS[6]

The Preamble to the Guidelines on the Role of Prosecutors makes it clear that the role of prosecutors is crucial in furthering the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal. Accordingly those selected as prosecutors must be individuals of integrity and ability, with appropriate qualifications and training. The Guidelines address, inter alia, status and conditions of service, freedom of expression and association, the role of prosecutors in criminal proceedings, rules or regulations to guide the exercise of discretion, alternatives to prosecution, relations with other agencies including the courts, defence and police, disciplinary proceedings and the obligation to observe the guidelines and report violations [7]

The UN Guidelines provide as follows:

Preamble:...

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,...

The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:...

(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures....

Role in criminal proceedings

10. The office of prosecutors shall be separated strictly from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall:
    (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
    (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of a suspect's human rights, especially involving torture or cruel inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution....

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Notes

CHAPTER ONE — INTRODUCTION

1 See especially Resolution 794, para. 10.
2 This point is made, for example, in the Report of the Board of Inquiry established by the Chief of the Defence Staff on April 28,1993.
3 This includes the Board of Inquiry (see note 2 above), and steps taken as a consequence thereof.

CHAPTER TWO — THE ROLE OF THE MILITARY POLICE

1 See *R.* v. *Généreux,* [1992] 1 S.C.R. 259, for a discussion of the importance of maintaining a separate military justice system. See also the discussion of this question in Part III below.
2 See R.S.C. 1985, c. N-5, s. 60(1).
3 These four themes correspond broadly to the responsibilities of the directors that report to the Director General Security (now Director General Security and Military Police).
4 For a treatment of the security aspects of the military police see the Hon. René Marin, *External Review of the Canadian Forces Special Investigation Unit* August 1990; and the Hon. René Marin, *Audit of External Review of the Canadian Forces Special Investigation Unit,* July 1994.
5 *R.* v. *Reddick* (1996), [1997] 112 C.C.C. (3d) 491, per Strayer C.J. for the Court, at 507: "[T]he nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court. Indeed I think it can be put aside as distracting from the real issue which is one of the division of powers."
6 See *R.* v. *Généreux*, cited above in note 4; *R.* v. *Brown* (1995), 35 C.R. (4th) 318 (C.M.A.C.). See also discussion in Chapter Three below.
7 The role of the commanding officer in the military justice system is discussed in greater detail in Chapter Three below.
8 Somalia Inquiry Liaison Team (SILT), Brief for the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia on Military Justice, at 10/20, para. 29.

9 The Hon. René J. Marin, *Audit of External Review of the Canadian Forces Special Investigation Unit,*" July 1994, at 7.
10 See A-SJ-100-004/AG-000, dated April 1, 1991.
11 The first of these two documents, Security and Military Police Services, provides general direction with regard to the organization and duties of military police. The second, Special Investigation Unit Services, is specifically concerned with the functions of the Special Investigations Unit (SIU).
12 See note 10 above, 1-2-1/1-2-2.
13 See A-SJ-100-004/AG-000, dated October 31, 1995, with modifications to c. 2, dated February 28,1996.
14 See, for example, QR&Os art. 21.41, 21.43, 21.44, 21.46, 21.56, 21.61, 21.73.
15 The terms of reference for the DG SAMP were set out in A-AD-020-001/JS-001 currently under revision.
16 See *Military Police Policies* (note 13 above), at 1-4 to 1-6. (This was also the position under *Military Police Procedures*.) See also *Police Policy Bulletin* 3.2/95: Special Appointed Persons: Status and Discretion, s. 7.
17 *Ibid.*, especially para. 31, *et seq.*
18 This division of responsibilities followed the *External Review of the Canadian Forces Special Investigation Unit* (the "Marin Report") in 1990. It was re-examined in a subsequent report in 1994 but no change of function has been made. See CFAO 22-3.
19 See *Military Police Policies*, above note 13, c. 18, para. 2. This service was created as a result of incidents in Operation Deliverance.
20 See CFAO 22-3 (concerning the SIU) and *Military Police Policies*, c. 18, paras. 3 and 4 (concerning National Investigation Service (NIS)).
21 See CFAO 22-4, para. 7; *Military Police Policies*, c. 1, para. 39.
22 See *Military Police Procedures*, c. 11, para. 3. The statements in this paragraph paraphrase some of the elements of c. 1 in *Military Police Policies*.
23 See *Security and Intelligence — Volume 4: Military Police in the Field*, B-SI-315- 004/FT-001 (1973).
24 See Operation Deliverance After Action Report — Military Police Operations, May 24, 1994, Note 144/16, Control No. 019127.
25 These concerns were expressed by Col, A.R. Wells in relation to events in Somalia in a memorandum to the Board of Inquiry on October 12, 1994, Control No. 001871.
26 See note 14 above.
27 See CFAO 22-4, para. 19; *Military Police Policies*, p. 4-5/4-6.
28 See CFAO 22-4 and *Military Police Policies*, c. 1.
29 Military police must notify a senior officer if aware of an attempt to influence the investigation of an offence: *Police Policy Bulletin* 3.2/95, para. 25.
30 See CFAO 22-4, para. 20.
31 See United States Army Regulations, AR 190-30 and AR 10-87, c. 4.

32 See Chapter Three for a discussion of this issue. See also M.L. Friedland, "Controlling Misconduct in the Military," study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, May 1996, at 94.
33 See M.L. Friedland, *ibid.*, at 94.
34 See Brief for ACPERS-A through DGPSC-A, prepared for visit to Australia of Mr. D. Pomerant, Director of Research, Commission of Inquiry with Provost Marshall Army (PM-A) and RACMP, December 18, 1996.
35 *Ibid.*
36 See DG SAMP presentation to the Armed Forces Council, December 12, 1995, on *Military Police Legal Status and Discretion*, R3609A; and see also Management, Command and Control Re-Engineering Team C-18 Security and Military Police, C-18/Op Thunderbird, Final Report, September 30, 1996.
37 Op Thunderbird, *ibid.*, at 16/44, para. b(6).
38 See L.E. Thomas, "The Thomas Report: Investigation of Delay in Investigating the Allegations of Misconduct/Poor Performance of Canadian Forces Members at the Bakovici Hospital, Bosnia-Herzegovina," November 8, 1996.
39 *Ibid.,* at 31.
40 *Ibid.,* at 31-33.
41 *Ibid.*, at 33.
42 *Ibid.*, at 41-42.
43 In the civilian setting, the separation of investigatory and prosecutorial functions is often achieved by giving responsibility for each function to separate law officers of the Crown, for example, the Solicitor General and Attorney General respectively. See Law Reform Commission of Canada, Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* Ottawa: Law Reform Commission of Canada, 1990, at 59-63 (herein after Working Paper 62).
44 That is, reporting both to the commander of the unit and to superior authorities within the military police.
45 See National Defence Headquarters (NDHQ) Study S1/95, *Options for an Inspector General (IG) Concept* (Draft, January 1996), 3i15-1 NDHQ Study 1 (CRS). See also M.L. Friedland, (note 32 above, at 112-125.
46 See NDHQ Study, at 14/14.
47 See A-SJ-100-004/AG-000, dated October 31, 1995, with modifications to c. 2, dated February 28, 1996.
48 These recommendations also complement the approach to military prosecutions taken in Chapter Three of this paper.

CHAPTER THREE — PROSECUTORIAL DISCRETION IN THE MILITARY SETTING

1 R.S.C. 1985, c. N-5.
2 See *National Defence Act,* s.60 (1).
3 See *National Defence Act,* s.61(1)(*c*).
4 See *National Defence Act*, 130.
5 See *National Defence Act*, 132(1).
6 *R.*v. *Reddick*, See Chapter 2, note 5.
7 See the *National Defence Act*, s. 130.
8 See the *National Defence Act*, s. 71.
9 This means that if a person is charged with an offence and the charge is later dismissed or the person is acquitted or convicted of the offence, that person cannot be tried for the offence again. See the *National Defence Act*, s. 66.
10 *R.* v. *Reddick* at 504-505 and 507 see Chapter 2, note 5. (references to footnotes omitted).
11 *R.* v. *Généreux*, at 293 see Chapter 2, note 1.
12 [1978] 1 F.C. 233 - 236 (T.D).
13 *R.*v. *Généreux*, at 281, See Chapter 2, note 1.
14 *R.* v. *Reddick* at 501, See Chapter 2, note 5, above.
15 See for example, "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces," QR&Os, vol. IV., Appendix 2.4, art. 7.
16 Testimony of Brigadier W.J. Lawson before the Standing Committee on National Defence, *Minutes of Proceedings and Evidence, No. 32, Tuesday, March 14, 1967, Respecting Bill C-243, an Act to Amend the National Defence Act* at 2114.
17 Speech of the Judge Advocate General "The Necessity for Military Law in Canada," an address to the Toronto Board of Trade, February 1994, pp.16-18.
18 *Ibid.* Speech of the Judge Advocate General, at 20 [emphasis added].
19 QR&Os, art. 1.02 (definitions).
20 Not below the rank of captain.
21 QR&O, art. 108.10(1).
22 Article 107.03 af the QR&Os states: "Where a complaint is made or where there are other reasons to believe that a service offence has been committed, an investigation *should* be conducted to determine whether there are sufficient grounds to justify the laying of a charge." However, section 161 of the *National Defence Act* provides: "Where a charge is laid

against a person to whom this part applies alleging that the person has committed a service offence, the charge *shall* forthwith be investigated in accordance with regulations made by the Governor in Council."

23 See QR&Os, art. 107.03.
24 *National Defence Act*, s.161.
25 QR&Os, art. 106.01.
26 QR&Os, art. 106.095.
27 QR&Os, art. 107.05(3).
28 *National Defence Act*, s. 273.3.
29 R.S.C. 1985, c. C-46, s. 487(1).
30 QR&Os, art. 107.12(2)(a).
31 That is, whether the charge should be proceeded on or dismissed; see QR&Os, art. 107.12(2)(*b*).
32 See *National Defence Act*, s. 162. Note also, if the commanding officer has delegated the matter to another officer, the delegate cannot decide not to proceed with the charge. If the delegate is of the view that no proceedings should be taken in relation to the charge, he or she must refer the matter to the commanding officer with a recommendation that the charge be dismissed see QR&Os (art. 107.12(1)(a).
33 See *National Defence Act*, *Ibid.*
34 See QR&Os, art. 108.10.
35 In addition, the accused has the right to elect trial by court-martial in relation to any other offence for which the appropriate punishment would involve detention, reduction in rank or a fine exceeding $200; See QR&Os art. 108.31(1).
36 See QR&Os, art. 108.11, and the accompanying table.
37 See QR&Os, art 108.12(3). The same is true if the delegated officer comes to this conclusion during the trial itself; see QR&Os, art. 108.14.
38 See QR&Os, art 108.24.
39 See the *National Defence Act,* s.163(1).
40 See QR&Os, art. 108.25(2). No commanding officer below the rank of major may try an officer cadet, nor does he or she have power to punish an officer cadet; see QR&Os, art. 108.27(2).
41 See *National Defence Act,* s. 163(2).
42 See QR&Os, art. 108.27, and accompanying table.
43 See QR&Os, art. 108.28(1)(*b*).
44 See QR&Os, art. 108.28(2).
45 See QR&Os, art. 108.28(3).
46 See QR&Os, art. 109.04(3)(*b*).
47 See QR&Os, art. 108.29.

48 Subject to an accused's request to exclude the public or the need to protect classified information; see QR&Os, art. 108.29(5),(6).
49 See QR&Os, art. 108.30. Trial of charges by higher authorities is dealt with in QR&Os chapters 109 and 110.
50 See QR&Os, art. 108.32(1).
51 See QR&Os, art. 108.32(2),(3).
52 See QR&Os, art. 108.33(3).
53 See QR&Os, art. 108.33(4).
54 See *The National Defence Act* s. 163(3); see QR&Os, art. 108.38.
55 See QR&Os, art. 108.41.
56 See the *National Defence Act*, s. 164(1).
57 Defined in QR&Os, art. 110.01, as an officer commanding a command, an officer commanding a formation, an officer of or above the rank of brigadier-general or any other officer appointed by the Minister for that purpose.
58 See QR&Os, art. 110.03, 110.04,, 110.05, 110.055, 110.06, 110.07, 110.08.
59 See QR&Os, art. 108.31(1)(*a*), 110.055(1)(a).
60 See QR&Os, art. 108.31(1)(*b*), 110.055(1)(b).
61 SILT, Brief for the Commission of Inquiry, pp.14-15, para. 42-45. See Chapter 2, note 8.
62 See QR&Os, art. 111.051(4).
63 Or a person designated by the Minister; see s. 165 of the *National Defence Act* and art. 111.05(d).
64 See QR&Os, art. 111.05.
65 See QR&Os, art. 111.051(3),(5).
66 QR&O, art. 111.051(6), (7).
67 See QR&Os, art. 111.21; and the *National Defence Act* s. 168(1).
68 *National Defence Act* s. 165.1(3), 170(g), QR&Os, art. 111.19, 111.20. But see the special rules in s. 168 (2),(3) and (4) *National Defence Act*, in relation to the required rank of court-martial members as a function of the rank of the accused.
69 See the *National Defence Act*, s. 170; see QR&Os, art. 111.20.
70 See QR&Os, art. 112.54(1).
71 See QR&Os, art. 112.54(2).
72 See QR&Os, art. 112.54(3). Note that art. 112.06 (Questions of Law or Mixed Law and Fact —Judge Advocate) sets out matters which are for the determination of the judge advocate. See art. 112.06(9).
73 See QR&Os, art. 111.22(2).
74 Administering oaths, hearing objections, assembling the participants, etc. See QR&Os, art. 112.05(2)-(5.2).

75 See QR&Os, art. 112.05(5)(*e*), 112.06.
76 See QR&Os, art. 112.05(7).
77 See QR&Os, art. 112.05(18)(*e*).
78 See QR&Os, art. 112.05(21)(*c*).
79 See QR&Os, art. 112.55.
80 See QR&Os, art. 112.55(2)(*a*),(*b*).
81 See QR&Os, art. 112.55(2)(*c*).
82 See QR&Os, art. 111.24(1). In *R.* v. *Généreux*, at 309 (see Chapter 2, note 1). Lamer C.J. stated that the fact that the convening authority appointed the prosecutor and the president and other members of the general court-martial offended s. 11(*d*) of the *Charter*. As mentioned, the president and other members of a general court-martial and a disciplinary court-martial are now appointed by the chief military trial judge: See QR&Os, art. 111.051(2).
83 See QR&Os, art. 111.24.
84 See QR&Os, art. 112.56(1).
85 See QR&Os, art. 112.56(2).
86 See QR&Os, art. 111.60(1).
87 See QR&Os, art. 111.60(8).
88 See QR&Os, art. 111.60(4).
89 See QR&Os, art. 111.60(6).
90 See QR&Os, art. 111.60(2).
91 See QR&Os, art. 111.61.
92 See the *National Defence Act*, s. 192(1); see QR&Os, art. 112.41(1).
93 See QR&Os, art. 112.50.
94 Although in some jurisdictions the advice of a prosecutor is required or routinely sought as a matter of practice.
95 See Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964); P.C. Stenning, *Appearing for the Crown* (Cowansville: Les Editions Yvon Blais, 1986); and the Law Reform Commission of Canada, Working Paper 62. (See Chapter 2, note 43, above)
96 See the table of functions of attorneys general and ministers of justice in Canada in Working Paper 62, at 124 (Appendix B).
97 See e.g., Criminal Code s. 319(6) (see note 29, above) in relation to offences of promoting hatred.
98 Report of the *Royal Commission on the Donald Marshall, Jr. Prosecution* (T. Alexander Hickman C.J., Chairman), Volume 1: *Findings and Recommendations*, (Halifax: Province of Nova Scotia, 1989), at 226-227, citing Stenning, see note 95 above, at 311.
99 *Ibid.*, at p. 224.
100 *Ibid.*, at pp. 220-221.

101 *Ibid.*, at p. *228*
102 *Ibid.*, at p. 229.
103 Working Paper 62, (see Chapter 2, note 43, at p. 53. See the discussion of the attributes of an office of director of public prosecutions below.
104 *Prosecution of Offences Act 1985,* (U.K.) 1985, c. 23.
105 See the *Public Prosecutions Act*, S.N.S. 1990, c. 21.
106 See the *1992-1993 Annual Report of the Public Prosecution Service*, at 11-12.
107 See the *Prosecution of Offences Act*, No. 22 of 1974 (Ireland); the *Director of Public Prosecutions Act,* 1983, No. 113 (Australia — Commonwealth); the *Director of Public Prosecutions Act,* 1990, No. 22 (Australian Capital Territory); the *Director of Public Prosecutions Act,* 1986, No. 207 (New South Wales); the *Director of Public Prosecutions Act,* 1982, No. 9848 (Victoria); the *Director of Public Prosecutions Act,* 1984, No. 95 (Queensland); the *Director of Public Prosecutions Act,* 1991, No. 12 (Western Australia); the *Director of Public Prosecutions Act,* 1990, No. 35 (Northern Territory).
108 See Working Paper 62, (Chapter 2, note 43), at 44-51
109 See the *Prosecution of Offences Act*, No. 22 of 1974, s. 2(2).(Ireland).
110 See the *Prosecution of Offences Act*, No. 22 of 1974, s. 2(7).(Ireland)
111 See the *Public Prosecutions Act*, s. 5(1)(b), (see note 105 above).
112 In the Northern Territory, the DPP may be appointed either for a fixed or an indeterminate term; See note 107 above.
113 Working Paper 62, (see Chapter 2, note 43 at 53).
114 *Public Prosecutions Act*, see note 105, above. A similar process is provided in the state of Victoria; see note 107 above.
115 A unique removal process is provided for in Ireland. The DPP is removable by Parliament after an investigation carried out by a committee made up of the Chief Justice, a judge of the High Court and the Attorney General into the DPP's health or conduct. This approach makes clear that no one person, nor the government acting alone, can bring about the removal of the DPP. Further, the use of a committee can help ensure that the views of representatives of the public inform the decision whether the director should be dismissed. It is also noteworthy that under the Irish legislation the grounds for removal are virtually open-ended: the DPP can be removed on the recommendation of the committee for any grounds relating to health or conduct, leaving it to the committee to determine the circumstances under which it would be appropriate to ask a director to step down. See note 107 above.
116 See note 105, s. 6 above.

117 See note 104, above, U.K., s. 3(1).
118 See note 107, above, New South Wales, s. 4(3).
119 See note 107, above, Queensland s, 10(2)
120 The federal policies on spousal assault prosecutions are set out in the appendix to this paper. (See Department of Justice [Canada], *Crown Counsel Policy Manual* [1993]).
121 Working Paper 62, (see Chapter 2, note 43) at 81-84.
122 *House of Commons Debates*, Vol. 483, col. 681, January 29, 1951.
123 Commission on Donald Marshall Prosecution, see note 98 above, at 229, citing Edwards (1969), 12 Crim. L.Q. 417 at 424.
124 *Ibid.,* recommendation 35, at 230.
125 See note 98 above, 235-236.
126 These factors are set out in the appendix to this paper.
127 See note 98 above, at 236-237.
128 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, (the Hon. G. Arthur Martin, Chairman), (Toronto: Queen's Printer, 1993).
129 *Ibid.*, at 51 (citing *R.* v. *McDougall*).
130 *Ibid.*, Appendix J, pp. 461-462.
131 Minister of Justice and Attorney General of Canada, *Crown Counsel Policy Manual* (January 1993).
132 Code for Crown Prosecutors (London: Crown Prosecution Services, 1994).
133 See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (Canberra: Commonwealth Government Printer, 1990). See also the appendix to this paper.
134 *United Nations Guidelines on the Role of Prosecutors*, Havana, Cuba, August 27 - September 7, 1990, UN Doc. A/CONF. 144/28 (1990), at 188.
135 H. Woltring, "Perspectives on the Independence of Judges, Prosecutors and Lawyers: The International View," delivered to the Society for Reform of Criminal Law, Whistler, BC, August 1996, at 6.
136 See M.L. Friedland (Chapter 2, note 32) at 94.
137 See U.K. QR&Os (Army), c. 4, Annex C, s. 25.
138 *Alexander Findlay* v. *United Kingdom* (No. 22107/93)(1995), Euro. Commo. Hor. at 20.
139 These are discussed below in relation to the question of the independence of the office of Judge Advocate General.
140 See Brief for ACPERS-A through DGPSC-A, Chapter 2, note 34.
141 See R.B. Cole,"Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?" (1992), 19 *American Journal of Criminal Law* 395 at 400-402.

142 See *Manual for Courts-Martial,* Notes for Courts-Martial (United States) Part II, R. 104(*a*)(1).

143 See article 97 of the Punitive Articles of the *Manual for Courts-Martial.*

144 See Maj Karl K. Warner, *The 10 Commandments of Unlawful Command Influence,* August 1990 (unpublished manuscript on file with Judge Advocate General's School, U.S. Army), at Q-9.

145 *Manual for Courts-Martial,* see note 142, above; emphasis added.

146 Note, however, the documentation that must accompany a commanding officer's application to a higher authority to dispose of a charge: See QR&Os art. 109.04(2). Further, the higher authority may request additional information: See QR&Os art. 109.05(1)(*a*).

147 See the *National Defence Act*, s. 212.

148 See the *National Defence Act*, ss. 207-209.

149 See *National Defence Act.*, s. 210(1).

150 R.B. Cole "Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?" (1992), 19 *Am. J. of Crim.* Law 395 at 410, quoting Maj L.J. Miner in *Military Justice — The Case for the Commander* (unpublished thesis, The Judge Advocate General's School of the Army, Charlottesville, VA.1971) [unpublished] at 29-30. A like opinion may be found in R.C. Barnes Jr., *Military Legitimacy — Might and Right in the New Millennium* (London: Frank Cass, 1996), at 124: While command influence should be removed from the courtroom, it should be restored to the disciplinary process. Military discipline in peacetime should rarely require criminal prosecution. For violation of military standards of conduct, as distinguished from criminal standards of conduct, there are ample administrative actions and non-judicial punishments available to the commander short of court-martial. These disciplinary measures do not prohibit command influence — they require it.

151 See note 131 above.

152 General Court-martial, Pte E.K. Brown, Canadian Airborne Regiment, Canadian Forces Base Petawawa, October 18-21, 1993.

153 *Ibid.*, at 233. The two other grounds raised by the defence in objection to the court's jurisdiction related to: (1) the jurisdiction of the General Court-Martial Court over the offence of murder considering the provisions of s. 70 of the *National Defence Act* and s. 477.1(1) of the Criminal Code; (2) the alleged violation of Pte Brown's Charter rights under s. 7 (right to proper due process), 11(*d*) (right to a fair trial) and 11(*f*) (right to a jury trial).

154 *Ibid.*

155 *Ibid.*, at 179-180.

156 *Ibid.*, at 231, 233.
157 *Ibid.*, at 181.
158 *Ibid.*, at 218.
159 Ibid at 243. In view of the court's disposition with respect to the issue of the reasonable apprehension of bias (i.e., finding there was a perceived bias) in connection with LCol Mathieu's role, it deemed it unnecessary to deal with the issue of apprehension of bias on the part of MGen Vernon (since there was no proper charge sheet on which MGen Vernon could act); nor did the court find it necessary to deal with the other two grounds raised by the defence on the plea in bar of trial.
160 *Ibid*, at 243-244.
161 *Ibid.*, at 235-236.
162 *Ibid.*, at 240.
163 *Ibid.*, at 241.
164 *Ibid., at 241*
165 *Ibid.*, at 241-242.
166 *R.* v. *Brown*, (1995), 35 C.R. (4th) 318 (C.M.A.C.).
167 *Ibid.*, at 330.
168 *Ibid.*, at 330. The court applied the reasoning in the case of *R.* v. *Johnstone* (December 14, 1993), C.M.A.C. 354 at 6 [unreported] where the Court-Martial Appeal Court, after examining the whole legislative scheme stated: "The legislative scheme being considered here is analogous to the preferring of an indictment in a criminal trial." The court also applied the decision in *R.* v. *Lunn* (1993), 19 C.R.R. (2d) 291 at 297 (C.M.A.C.), where the court stated:

> Persons making decisions relative to this laying and prosecution of charges must act according to the law, but the law does not require their independence or impartiality.... What is required of them is that they not act in a manner that may be seen, by a reasonable and informed person, as drawing the administration of justice into disrepute.

169 See note 131 above, at I-5-1.
170 *Ibid.*, at I-5-6, I-5-7. Note that, in some jurisdictions, prosecutors screen charges before the charges are laid. This is discussed further below.
171 See the Criminal Code, s. 21. See also, e.g., *R.* v. *Nixon* (1990), 78 C.R. (3d) 349 (B.C.C.A.). There, a police officer in charge of a lock-up was liable for an assault committed by another police officer against a person in custody.
172 A.D. Heard, "Military Law and the *Charter of Rights*" (1987), 11 *Dalhousie Law Journal* 514 at 534.
173 D.J. Corry, "Military Law under the *Charter*" (1986), 24 *Osgoode Hall Law Journal* 67 at 118.

174 Such as D.J. Corry, *ibid.*; K.W.Watkin, *Canadian Military Justice: Summary Proceedings and the Charter* (See LL.M. thesis. Queen's University, 1990), at 285-291; M.L. Friedland, "Controlling Misconduct in the Military" (See Chapter 2, note 32 above, at 92-102, and 122-123).

175 Speech of the Judge Advocate General, See Chapter 2, note 17 above, at 27-28.

176 *Ibid.*, at 29.

177 Terms of Reference for National Defence Headquarters Staff, TOR 1.0.2, A-AE-D20- 001/AG-001, January 1, 1985 at 1-20.

178 Commission of Inquiry, meeting with Judge Advocate General, April 20, 1995, per Gen Boutet, at 21. See also, Col. M.W. Drapeau "The Canadian Military Justice System: Does it Work?" (199) *Esprit de Corps*, Vol. 4, No. 10, 4 at 5.

179 (See Chapter 2, note 43 above)Working Paper 62, at 124.

180 *R.* v. *Ingebrigtson* (1990), 61 C.C.C. (3d) 541 (C.M.A.C.). See R.D. Lunau, "Military Tribunals under the *Charter*" (1992), 2 N.J.C.L. 197 at 212, who states of the decision in *Ingebrigtson:* "Although the officer of Judge Advocate General is an ancient one, it is still evolving in Canada, and no tradition of independence from the military and political executives seemed to presently exist."

181 *R.* v. *Genereux.* see Chapter 2, note 1 above, R.D. Lunau, *ibid.,* at 214 said of *Généreux:* "The appointment of the judge advocate by the Judge Advocate General undermined the institutional independence of the General Court Martial because of the close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the executive." While judge advocates are now appointed by the Chief Military Trial Judge, the point about "close ties" to the executive remains.

182 Office of the Judge Advocate General, *The Judge Advocate General's Officer [(U.K.)],* at 11.

183 *Findlay* see note 138, above, at 20 September 5, 1995.

184 Draft Clauses, *Army Act*, 1955, ss. 76D-E.

185 See the Hon. J.W. Rant, CB, QC, Judge Advocate General, "Findlay: A Shot in the Head or the Arm?" (draft), at 8.

186 *Defence Force Discipline Act*, 1982, No.152, ss. 179, 180.

187 Judge Advocate General, *Defence Force Discipline Act, 1982 — Report for the period 1 January to 31 December 1995* (Canberra: Australian Government Publishing Service, 1996), at 1 para.6.: "The JAG should not, in my opinion, act as a general legal adviser to the ADF (Australian Defence Force) as that would be inconsistent with judicial office."

188 *Ibid.*, at 5 para 32.a.

189 Working Paper 62, (note 95 above), at 70-71.

190 See note 128 above, Martin Report, at 121, citing J.Ll.J. Edwards, "The Charter, Government and the Machinery of Justice" (1987), 36 U.N.B.L.J. 41 at 46.

191 *Ibid.*, Appendix J, at pp. 463 and 464.

APPENDIX — GUIDELINES AND STANDARDS RELATING TO PROSECUTIONS

1 *Report of the Royal Commission on the Donald Marshall, Jr. Prosecution* (T. Alexander Hickman C.J. Chairman), *Volume 1: Findings and Recommendations* (Halifax: Province of Novia Scotia, 1989).

2 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (the Hon. G. Arthur Martin, Chairman), (Toronto: Queen's Printer, 1993).

3 Department of Justice (Canada), *Crown Counsel Policy Manual* (1993).

4 Crown Prosecution Service (United Kingdom), *Code for Crown Prosecutors* (June 1994).

5 Commonwealth Director of Public Prosecutions (Australia), *Prosecution Policy of the Commonwealth* (Canberra: Commonwealth) (Government Printer, 1990).

6 *United Nations Guidelines on the Role of Prosecutors*, Havana, Cuba, August 27 – September 7,1990, UN Doc. A/CONF. 144/28 (1990).

7 H. Woltring, "Perspective on the Independence of Judges, Prosecutors and Lawyers: The International View." delivered to the Society for Reform of Criminal Law, Whistler, BC, August 1996, at 6.

Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion

James W. O'Reilly and Patrick Healy

This study considers issues of independence and integrity with respect to policing and prosecution in the military setting. It concludes that significant adjustments must be made in structures and practices to ensure that the Canadian public has a high standard of confidence in military justice. Recommendations are made with an emphasis on the need for independence at all stages of investigations and prosecution.

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